No. 90-1388

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PAMELA S. DEMPSEY, SUE TERRY, and NANCY J. PENDERGRAFT,

Petitioners,

v.

HARRY A BENDIBURG, INDIVIDUALLY, AND AS THE ADMINISTRATOR OF THE ESTATE OF CARL BENDIBURG, DECEASED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

1. Whether a State official's immunity from trial and monetary liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny may be defeated by a trial court's refusal to decide the official's entitlement to immunity on summary judgment because the court thought disputed issues of fact created a jury question?

2. Whether, in light of *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990), a procedural due process claim is stated when a caseworker, who reasonably believes a medical emergency exists, but lacks "uncircumscribed power" to change parental custody herself, obtains an *ex parte* court order to remove a child from the parent's custody so the child may receive medically recommended treatment?

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* If certiorari is granted, a third question will be presented for review: Whether, when a caseworker reasonably believes a child in state custody pursuant to an *ex parte* order needs medical treatment, a subsequent surgical procedure based on her consent may constitute either a battery or a violation of the child's substantive due process rights? (See n. 6, *infra*.)

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals and in the District Court were:

Pamela S. Dempsey Rittweger
Sue Terry
Nancy J. Pendergraft
Nancy Harrison
Medical Personnel Pool of Atlanta, Inc.
Richard W. Cohen, M.D.
Klaus, Cohen & Weil, Orthopaedic Associates, P.C.
Baheeg Shadeed, M.D.
Adventist Health Systems/Sunbelt, Inc. d/b/a Smyrna Hospital

Harry A. Bendiburg, Individually and As Administrator of the Estate of Carl Bendiburg, deceased.

The original parties in the District Court, who were dismissed, were:

Cobb County Department of Family and Children Services of the State of Georgia

Cobb County, Georgia

Honorable Sally T. Walker, Judge Pro Tempore, Juvenile Court of Cobb County, Georgia

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Pamela S. Dempsey, Sue Terry, and Nancy J. Pendergraft respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on August 20, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported as *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990) and is printed as Appendix "A", p. 1a *infra*. The final unreported memorandum decision of the United States District Court for the Northern District of Georgia, is reprinted as Appendix "B", p. 14a, *infra*. The initial memorandum decision of the United States District Court for the Northern District of Georgia is reported as *Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga. 1989), and is reprinted as Appendix "C", p. 24a, *infra*.

JURISDICTION

Respondents brought this action under 42 U.S.C. § 1983 in the Northern District of Georgia. The District Court entered orders in this case dated January 5, 1989, and July 3, 1989, which are reprinted as Appendices "C" and "B", pages 24a and 14a, *infra*. The Court of Appeals affirmed the Northern District's judgment on August 20, 1990. See Appendix "A", p. 1a, *infra*. A Suggestion of Rehearing En Banc was filed on September 10, 1990, and denied on October 31, 1990. App. "G", p. 89a, *infra*.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes involved are:

42 U.S.C. § 1983:

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia, shall be considered to be a statute to the District of Columbia.

The relevant provisions of the Georgia Juvenile Court Code are reprinted as App. "F", p. 86, *infra*.

STATEMENT OF THE CASE

After Harry Bendiburg's 15-year-old son, Carl Bendiburg, was seriously injured in an automobile accident, problems arose in the in-home nursing administration of intravenous antibiotics, resulting in inadequate antibiotics to treat a serious bone infection in the boy's leg. When Carl's physicians recommended insertion of a Hickman catheter to facilitate the antibiotic treatment, Mr. Bendiburg refused to consent to the procedure.

Due to Carl's deteriorating condition, his treating physician, Dr. Richard Cohen, directed Nancy Harrison,

the home health nurse, to contact the Department of Family and Children Services (DFACS) for assistance. On November 27, 1985, when Ms. Harrison telephoned DFACS, she told a DFACS caseworker, Petitioner Pamela Dempsey, about Carl's condition and explained that a Hickman catheter could be inserted to allow for the proper antibiotic dosage.[1] Dempsey inquired about Carl's father and was told that the father had previously indicated he would agree to the procedure but did not follow through. It is undisputed that Harrison further told Dempsey that without the proper dosage of antibiotics, Carl could either die from the infection or lose his leg. *See*, App. "D", p. 81a, *infra*.

Because of the perceived urgency of the situation, Dempsey and her supervisor,[2] Petitioner Sue Terry, decided a petition needed to be presented to the juvenile court before the courts closed for the next four days for the Thanksgiving holiday. Dempsey presented a petition, alleging that Carl was medically deprived, and a proposed order to the juvenile court. In accordance with DFACS policy, the constitutionality of which is unchallenged in this lawsuit, notice was not given to Mr. Bendiburg prior to Dempsey's presentation of the petition. Based on Dempsey's sworn testimony regarding her

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[1] A copy of Pamela Dempsey's contemporaneous notes of her conversation with Harrison appear in the record and are reprinted as App. "D", at p. 81a, *infra*.

[2] Dempsey's immediate supervisor, Petitioner Nancy Pendergraft, was not in the office on November 27, 1985; therefore, Pendergraft's supervisor, Petitioner Terry, was acting as Dempsey's supervisor.

conversation with Harrison, the court determined that there was probable cause to believe that Carl Bendiburg was deprived, that he was in need of medical care, and that it was in his best interest to be placed in the temporary custody of DFACS. The juvenile court judge granted an *ex parte* order to that effect for the sole purpose of allowing reasonably necessary treatment to meet Carl's medical needs. A hearing was then set for the next available court date, Monday, December 2, 1985.

Petitioner Dempsey went directly from the juvenile court to the office of the treating physician, who conveyed to her that there was an "urgency" to the situation, and that the procedure "needed to be done fairly quickly." In fact, Dr. Cohen testified by deposition that, in his medical judgment, Carl could have died or lost his leg in the next four days; Dr. Cohen's letter of November 27, 1985, to the juvenile court explaining the seriousness of Carl's situation and the need for the insertion of the catheter appears in the record and is attached hereto as App. "E", p. 82a, *infra*.

After speaking with Dr. Cohen, Petitioner Dempsey immediately went to see Carl and explained to him the order signed by the juvenile court judge. On the same day, Carl was taken by ambulance to the hospital, where Dempsey signed the requisite admission and surgical consent forms. Dempsey also notified Harry Bendiburg by telephone of both the surgical procedure scheduled for Thanksgiving day, November 28, 1985, and the court hearing set for December 2, 1985.

The Hickman catheter was implanted as scheduled. On December 2, 1985, the juvenile court hearing was held

at which a consent order, providing for the return of custody of Carl to his father, was signed by attorneys for DFACS and Mr. Bendiburg. Neither Mr. Bendiburg, a licensed attorney, nor his attorney of record requested a further hearing or had anything else to say. Nor, when Carl was returned to his father's custody, did Mr. Bendiburg make any effort to have the Hickman catheter removed. On December 14, 1985, Carl Bendiburg died from a pulmonary embulus, which could have been caused by the catheter.

Harry Bendiburg filed an action pursuant to 42 U.S.C. § 1983 against Petitioners and the private health care providers alleging substantive and procedural due process violations of his parental rights, a conspiracy to violate those rights, and pendent state law claims for battery.

In its order of January 5, 1989, p. 24a, *infra*, the District Court granted Petitioners' motion for summary judgment on the substantive due process claim but denied summary judgment on both Mr. Bendiburg's procedural due process claim and the pendent state law claim for battery.[3]

On August 20, 1990, the Eleventh Circuit Court of Appeals affirmed the dismissal of Mr. Bendiburg's substantive due process claims. As to all other constitutional claims pursuant to § 1983 against Petitioner, as well as the

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[3] A second order of July 3, 1989, p. 14a, *infra*, addressed the claims of Harry Bendiburg in his capacity as administrator of Carl Bendiburg's estate; in that order, the district court denied Petitioners' motion for summary judgment on both the substantive and procedural due process claims.

pendent state law claims for battery, the Court of Appeals affirmed the denial of summary judgment, and held that factual disputes precluded the Petitioners' claim to qualified immunity. Appendix "A", p. 1a, *infra*. A Suggestion of Rehearing En Banc was denied on October 31, 1990. App. "G", p. 89a, *infra*.

REASONS FOR GRANTING THE WRIT

I. IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, THE COURT OF APPEALS ERRONEOUSLY DEPRIVED PETITIONERS OF THEIR IMMUNITY DEFENSE.

This case presents an important issue which faces every federal court that has to consider a state official's petition for summary judgment on qualified immunity grounds: whether the judge should resolve all issues, both legal and factual, or whether disputed questions of fact must be decided by the jury. Petitioners submit that both the language of, and the policy underlying, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny dictate that the judge must decide all aspects of qualified immunity questions, and that, in ruling to the contrary, the Court of Appeals has caused unacceptable costs to flow "not only to the defendant officials, but to society as a whole." *Harlow, supra* at 814 (footnote omitted).

When this Court "completely reformulated qualified immunity" in *Harlow* by "replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action," *Anderson v. Creighton*, 483 U.S. 635, 645

(1987), it did so to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow, supra,* at 817-818. The *Harlow* rule was not devised to benefit merely the individual government officials being sued, but rather to prevent those social costs which include, in addition to the time, expense and energy consumed by litigation, "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow, supra,* at 814, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950) (bracketed material in original).

These policy considerations were reemphasized in this Court's post-*Harlow* decisions, *see e.g., Davis v. Scherer,* 468 U.S. 183, 195 (1984) ("the qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated"); *Mitchell v. Forsyth,* 472 U.S. 511, 527 (1985) (qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct); *Malley v. Briggs,* 475 U.S. 335, 341 (1986) (as a matter of public policy, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Anderson, supra,* at 643; ("an immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide").

In disregard of the "driving force" behind *Harlow's* objective test – that insubstantial claims against government officials be resolved on summary judgment, *Anderson, supra,* at 640 n.2, – the Eleventh Circuit affirmed the trial court's denial of Petitioners' motion in this case for summary judgment on qualified immunity grounds. App. "A". After reviewing deposition testimony, the trial court concluded that

> [W]hether this turns out to be an arrogantly self-assured officious intermeddling in a matter where reasonable minds could disagree or a necessarily hurried and unquestionably proper response to an immediate medical emergency must be resolved upon consideration of the proof at trial. Because a question of fact exists on this point, this aspect of defendants' motions for summary judgment must be DENIED.

707 F. Supp. at 1326 (App. "C").

By agreeing that "critical factual issues concerning the validity of the consent to the medical procedure" must be decided by the jury (App. "A"), the Eleventh Circuit has defeated Petitioners' "entitlement not to be forced to litigate the consequences of official conduct" *Mitchell, supra,* at 527, an approach analogous to that of the Eighth Circuit Court of Appeals in *Creighton v. City of St. Paul,* 766 F.2d 1269, 1273 (8th Cir. 1985), *vacated sub nom. Anderson v. Creighton, supra.* Plaintiffs in *Creighton* brought suit against an FBI agent seeking damages resulting from the warrantless search of their home. The trial court granted Agent Anderson's motion for summary judgment on grounds of qualified immunity under *Harlow* "because, in substance, his warrantless search of the Creightons' home was reasonable." 766 F.2d at 1272. The

Eighth Circuit reversed because it thought the record revealed "numerous unresolved factual controversies on the issues of probable cause and exigent circumstances which should be resolved by the jury . . . ." *Id.* at 1273. In firmly rebuffing the approach taken by the Eighth Circuit, this Court emphasized that:

> [i]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

Anderson, supra, at 641. *Accord: Malley, supra,* at 341 (if officers of reasonable competence could disagree on whether a warrant should issue, immunity should be recognized); *United States v. Leon,* 468 U.S. 897, 922 (1984) (court must decide in suppression hearing whether officer's reliance on magistrate's probable-cause determination and on the technical sufficiency of warrant he issues is objectively reasonable). Since the same "objective reasonableness" test has been followed in *Harlow, Leon* and *Malley,* and since it clearly may be applied by the judge alone in a suppression hearing, there certainly are no policy reasons for a jury determination under the analogous facts of this case.

Here, the state official is a child protective services worker rather than a law enforcement officer, but the question is the same: whether a reasonable officer could have believed exigent circumstances existed. By sending that question to the jury and forcing Petitioners to stand

trial, the Eleventh Circuit has followed the same course disapproved of by this Court in *Anderson*.

Moreover, by repeatedly[4] referring disputed questions of fact to a jury in the qualified immunity context, the Eleventh Circuit[5] not only contravenes Supreme Court precedent, but also conflicts with the approach taken by other Circuit Courts of Appeal. For example, in *Hughes v. Meyer*, 880 F.2d 967 (7th Cir. 1989), plaintiffs alleged that two defendant sheriffs violated their Fourth Amendment rights by arresting them without probable cause. On appeal, plaintiffs contended the district court had erred in granting the sheriffs' motion for summary judgment on qualified immunity grounds because a reasonable jury could have found the defendants did not have a good faith reasonable belief they had probable cause to arrest the plaintiffs and such factual issues would preclude summary judgment. 880 F.2d at 969. However, the Seventh Circuit disagreed, ruling that:

> [w]hat a jury could have found is not at issue in deciding a summary judgment motion on the issue of qualified immunity. This circuit has recently held that, *even though pertinent facts may be in dispute, the question whether immunity attaches is always one for the judge to decide.*

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[4] *See, e.g., Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990); *Herren v. Bowyer*, 850 F.2d 1543 (11th Cir. 1988); *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988).

[5] *Accord: Boswell v. County of Sherburne*, 849 F.2d 1117 (8th Cir. 1988); *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 103 L.Ed.2d 943 (1989).

Id., citing Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) (emphasis supplied); *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. *en banc*), *cert. denied*, 488 U.S. 968 (1988). Other Courts of Appeal also recognize that the trial judge properly makes the immunity decision, but differ on the factual predicate required.[6] This clear conflict between the various Circuit Courts of Appeal demonstrates that the Eleventh Circuit has erroneously defeated Petitioner's immunity defense, which is an "*immunity from suit* rather than a mere defense to liability . . . [and which] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell, supra* at 526 (emphasis in original; bracketed material added). In these days of severe budget restrictions, states ought not be required to allocate scarce resources to litigating every case through a jury trial, when those resources might

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[6] *See, e.g., Fludd v. United States Secret Service*, 771 F.2d 549 (D.C. Cir. 1985) (trial court prohibited from holding factual hearing; must assume plaintiff's version of facts); *Ellsberg v. Mitchell*, 709 F.2d 51, 69 (D.C. Cir. 1983) (factual judgments to be made solely by trial judge, even by *ex parte* examination of exhibits if necessary) *cert. denied*, 465 U.S. 1038 (1984); on remand, 807 F.2d 204, 207 (D.C. Cir. 1986) (in light of complaint's inadequacy, even discovery should not have been allowed), *cert. denied*, 484 U.S. 870 (1987); *Vaughn v. Ricketts*, 859 F.2d 736 (9th Cir. 1988) (court looks only at facts alleged by plaintiff); *Brown v. United States*, 851 F.2d 615 (3rd Cir. 1988) (court decides, but defendant must file affidavit or deposition to establish his version of facts); *Stoneking v. Bradford Area School Dist.*, 856 F.2d 594 (3rd Cir. 1988), vacated on other grounds, 109 S.Ct. 1333 (1989); (court should look only at pleadings in light most favorable to plaintiff); *Runge v. Dove*, 857 F.2d 469 (8th Cir. 1988) (court should accept plaintiff's version of the facts).

otherwise be used to provide needed services to its citizens.

Petitioners therefore respectfully submit that plenary review by this Court is required to correct the Eleventh Circuit Court of Appeals' opinion; to resolve the split in the approach to qualified immunity taken by the various Circuit Courts of Appeal; and to give further guidance on this important issue to the lower courts.

II. THE COURT OF APPEALS' RULINGS ON RESPONDENTS' DUE PROCESS CLAIMS CONFLICT WITH DECISIONS OF THIS COURT.

The Court of Appeals has created a confusing precedent in its treatment of Count One of Respondents' Complaint, in which Respondents purported to set out a due process violation by alleging, *inter alia*, that:

> the termination of the Plaintiff's parental rights in his son without notice and a hearing before a "judge' [sic] without jurisdiction was the product of a corrupt conspiracy between and among the Defendants, the purpose of which was to obtain and maintain custody of Carl Bendiburg so they could perform a medical procedure against the will and counter to the best judgment of Carl's father, his legal guardian.

Amended Complaint, ¶ 30.[7]

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[7] In addition to this procedural due process question, substantive due process issues were heard and ruled upon by district court. (App. "C"). If certiorari is granted, Petitioners will discuss in more detail the lower court's error with regard

(Continued on following page)

In ruling upon Petitioners' qualified immunity defense, the Eleventh Circuit should have determined whether Petitioners were immune from trial and liability for civil damages because their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow, supra* at 818, at the time the incidents in this case occurred, November 1985.

At that time, this Court's decisions had made it "plain beyond the need for multiple citation that a parent's desire for and the right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). However, it also would have been abundantly clear to a caseworker in the fall of 1985 that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979); *see also, Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Thus, the more pertinent decision for state officials such as Petitioners in 1985 was what process would have been due Respondents before the parent's right to custody of his child might be disrupted to protect the child.

(Continued from previous page)

to substantive due process and the related state battery claim. An additional question to be presented if plenary review is granted is set out on p. i, *supra*.

Petitioner submits that this Court's teachings in *Parratt v. Taylor*, 451 U.S. 527 (1981) and its progeny control what Petitioners reasonably should have known concerning Respondents' procedural due process rights.

The *Parratt* rule[8] stands for the proposition that both negligent and intentional takings of liberty[9] or property may be justified without any pre-deprivation[10] process when they are

> a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur.

Parratt, 451 U.S., at 541.

Without adequate analysis, the Court of Appeals avoided application of the *Parratt/Hudson* doctrine by

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[8] When modified by *Hudson v. Palmer*, 468 U.S. 517 (1984) this rule is frequently referred to as *Parratt/Hudson*. *Parratt* involved the negligent loss of a prisoner's property by prison employees; *Hudson* extended *Parratt* to intentional deprivations of property.

[9] As *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 118 (1990) clarified, "the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule."

[10] Applying the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court has usually held that the Constitution requires some type of hearing before state officials may deprive a person of liberty or property. *Zinermon, supra*, 108 L.Ed.2d 115. However, in some circumstances the Court has emphasized that "a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Id.*

citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). (App. "A"). Thus, absent correction by this Court, the Court of Appeals' reference to *Logan* would leave not only the district court on remand, but also other courts, with the erroneous assumption that the *Parratt/Hudson* rule does not apply in this or similar cases because of the *Logan* exemption. In *Logan*, this Court held that the post-deprivation remedies approved in *Parratt* would not suffice because, "[u]nlike the complainant in *Parratt*, *Logan* [was] challenging not the Commission's error, but the 'established state procedure' that destroy[ed] his entitlement without according him proper procedural safeguards." *Logan, supra*, 455 at 436. (Bracketed matter supplied). However, *Logan* "plainly has no relevance here," because, as in *Hudson, supra*, at 543, it is undisputed that Respondents are not challenging the constitutionality of DFACS policy or Georgia's Juvenile Court Code procedures (O.C.G.A. Ch. 15-11), followed in the instant case. Plenary review thus needs to be granted to avoid confusion in the lower courts resulting from the Eleventh Circuit's opinion.

Moreover, even without consideration of the qualified immunity defense, the Court of Appeals has left state officials uncertain how to gauge their future conduct by implying that Respondents stated a cause of action cognizable under § 1983 for deprivation of procedural due process rights. The Court of Appeals placed State officials in this untenable position by its failure to consider this Court's most recent explication of the *Parratt* rule in *Zinermon v. Burch*, supra.[11] If *certiorari* is granted,

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[11] The Eleventh Circuit's post-*Zinermon* position thus presents a conflict in principle with that of other Courts of

(Continued on following page)

Petitioners will discuss all of the *Zinermon* factors; however, for purposes of this petition, it is sufficient to focus on the third factor on which *Parratt* was distinguished. In that aspect of its discussion, this Court emphasized that the *Zinermon* petitioners could not characterize their conduct as "unauthorized" in the sense that term had been used in *Parratt/Hudson* because the state had "delegated to them the power and authority to effect the very deprivation complained of" (the petitioners' confinement in a mental hospital), and had also delegated to them the "concomitant duty" to initiate the procedures intended to guard against unlawful confinement. *Zinermon, supra*, 108 L.Ed.2d at 122.

In contrast, Petitioners herein, child protective services caseworkers and their supervisors, have no "broadly delegated, uncircumscribed power," *id.* at 120, to deprive parents of the custody of their children; rather, they may only assess the situation and make emergency petitions to the juvenile court if deemed necessary. Under Georgia's mandatory Juvenile Court Code, O.C.G.A. Ch. 15-11, caseworkers may not even file petitions alleging medical neglect without the juvenile court itself finding

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(Continued from previous page)

Appeal, *see, e.g., Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3406 (Jan. 22, 1991) (state's post-deprivation remedies adequate to redress alleged conspiracy by DFACS officials to deny license to adoption agency); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990) (*in banc*), *cert. denied*, 59 U.S.L.W. 3432 (Jan. 22, 1991) (due process satisfied by available post-deprivation state remedies for random and unauthorized failure of college officials to follow employment termination procedures).

that the petition is in the best interest of the child. O.C.G.A. § 15-11-23. It is the juvenile court that makes all the operative decisions in the case, *i.e.*, whether to deny the filing of the petition; permit the petition to be filed but find that it does not warrant immediate action; or find cause to believe that the child is in immediate danger and direct that custody of the child be obtained. *See* O.C.G.A. §§ 15-11-2(10); 15-11-17(a)(1); 15-11-19(a)(3); and 15-11-23. (App. "F"). Without the intervention of the juvenile court judge, Petitioners never could have obtained custody of Respondents' son. Moreover, it is the juvenile court judge who, if she thought Respondent's procedural due process rights were being violated, had the "concomitant duty" to initiate the procedural safeguards in the Juvenile Court Code, such as the provision of notice, court-appointed attorneys, and guardians *ad litem*. *See, e.g.*, O.C.G.A. § 15-11-30(b). (App. "F").

Since any alleged deprivation of Respondents' constitutional rights in the instant case was truly "random and unauthorized" in the sense that term was used in *Parratt* and *Hudson*, and clarified in *Zinermon*, the Court of Appeals' decision at odds with those rulings will create confusion not only among the lower federal courts, but will also leave State officials such as Petitioners without desperately needed guidelines as they attempt to secure critical medical care for deprived children. On the one hand, caseworkers have an affirmative duty to provide medical care and treatment to deprived children within State custody, *see DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199-200 (1989); on the other, they will have to stand trial for consenting to such treatment under the Eleventh Circuit's opinion in this

case. Petitioners therefore submit that a writ of certiorari should issue to correct the Eleventh Circuit's misinterpretation of the *Parratt* rule; to resolve the conflict among the circuits; and to provide further guidance to the lower courts and State officials on this subject of great importance.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

Harry A. BENDIBURG, Individually and as Administrator of the Estate of Carl Bendiburg, Deceased, Plaintiff-Appellee.

v.

Pamela S. DEMPSEY, Sue Terry, and Nancy J. Pendergraft, Defendants-Appellants.

Michael J. Bowers, Atty. Gen., William C. Joy, Sr. Asst. Atty. Gen. Bruce M. Edenfield, Sp. Asst. Atty. Gen., Hicks, Maloof & Campbell, R. Jerry Kirkpatrick, Michael A. Pannier, Victoria H. Tobin, Hart & Sullivan, Atlanta, Ga., for defendants-appellants in Nos. 89-8173, 89-8259, 89-8632, 89-8742.

Harold D. Corlew, Walls & Corlew, Atlanta, Ga., for Bendiburg.

Henry D. Green, Jr., R. Jerry Kirkpatrick, Sullivan, Hall, Booth & Smith, Atlanta, Ga., for Shadeed.

Bruce M. Edenfield, Hicks, Maloof & Campbell, Atlanta, Ga., for Dempsey, Terry, Pendergraft in No. 89-8348.

Sidney F. Wheeler, Long, Weinberg, Ansley & Wheeler, Stephen H. Sparwath, Atlanta, Ga., for Cohen, Drs. Klaus, Cohen & Weil Orthopaedic Assoc. in No. 89-8348.

R. Jerry Kirkpatrick, Michael A. Pannier, Hart & Sullivan, P.C., Atlanta, Ga., for Shadeed in No. 89-8348.

Stephen H. Sparwath, Long Weinberg Ansley & Wheeler, Sidney F. Wheeler, Bruce M. Edenfield, Sp. Asst.

Atty. Gen., Hicks, Maloof & Campbell, P.C., Alan F. Herman, Freeman & Hawkins, Timothy H. Bendin, Sullivan Hall Booth & Smith, Henry D. Green, Jr., Atlanta, Ga., for defendants-appellees in No. 89-8691.

Appeals from the United States District Court for the Northern District of Georgia.

Before CLARK, Circuit Judge, RONEY*, Senior Circuit Judge, and ATKINS**, Senior District Judge.

RONEY, Senior Circuit Judge:

These consolidated appeals from summary judgment orders raise complex legal issues but grow out of simple, tragic facts. Seeking money damages, Harry Bendiburg, an attorney, has sued various state employees and private doctors for their actions in connection with the medical treatment of his son, Carl, not for malpractice, but violation of due process rights and for battery.

Having sustained serious injuries in an automobile accident, which claimed his mother's life, 15-year-old Carl's medical treatment became a matter of controversy between the plaintiff father and the defendants. In order to give the treatment that the defendants thought necessary, a court order was obtained temporarily removing the custody of plaintiff's son, during which time the state custodian consented to the controversial treatment. After the medical procedure was performed and after custody was returned to the plaintiff, Carl died.

See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

All defendants filed motions for summary judgment addressing the two-count complaint brought by Bendiburg, individually and as administrator of his son's estate, for civil rights violations under federal law and for battery under state law. The district court granted some motions, from which the plaintiff appeals, and denied some, from which defendants appeal. This left for trial: (1) a procedural due process claim against the state employees who obtained an *ex parte* court order for temporary custody and consented to the surgery, (2) the estate's substantive due process claim, and (3) the state battery claim against all defendants. The defendants have appealed the denial of summary judgment on these claims. The court dismissed all state employees and entities in their official capacities, and dismissed the due process claims against all private defendants. From these orders the plaintiff appeals. We reverse the summary judgment for the defendant as to the treating nurses and physicians on the § 1983 due process claims. Otherwise, we affirm essentially on the basis of the carefully reasoned order of the district court reported as *Bendiburg v. Dempsey*, 707 F.Supp. 1318 (N.D.Ga. 1989), and an unpublished order in N.D.Ga. Civil Action No. 1:87-CV-1774-JOF, dated June 30, 1989. We will not here repeat or amplify all the points of decision. The two Orders sufficiently report the facts so that a detailed recitation is not necessary here. The district court's discussion of the § 1983 due process claims, which we reverse, is found at 707 F.Supp. at pp. 1326-1330.

After several weeks of hospitalization following the automobile accident, Carl was discharged to home care.

At that time a bone infection was being treated intravenously. The continual collapse of surface veins created difficulty for Carl's home care nurses as they attempted to administer prescribed antibiotics. This led to a decision by Carl's orthopaedic physician that antibiotics should be introduced into Carl's body by the insertion of a Hickman catheter. A Hickman catheter is inserted in the subclavian or jugular vein, and then threaded through a patient's upper venous system to the juncture of the superior vena cava and the right atrium of the heart.

Carl's father considered the use of a Hickman catheter too risky and repeatedly made his objections known to the surgeon, the attending physician, and the nurses who performed and supervised home care services. Bendiburg's unwillingness to consent to the catheter led to contact with the Cobb County Department of Family and Children Services (DFACS), a government organization charged with the welfare of children. The defendant employees of DFACS then presented an *ex parte* petition for temporary custody to the Juvenile Court of Cobb County, without notice to his father. Upon entry of an order transferring custody of Carl from plaintiff to DFACS, consent was given for the Hickman catheter procedure. Sixteen days later, Carl died, allegedly as a result of a massive pulmonary embolus caused by the Hickman catheter being inserted into his heart.

The defendants in this case are:

1. DFACS' employees in their individual capacities;[1]

2. The organization providing home nursing care to Carl, and its nurse employee;[2]

3. Carl's treating physicians;[3] and

4. The surgeon who performed the Hickman catheter procedure, Dr. Baheeg Shadeed.

The critical issue in this case involves the propriety of the giving of consent to the surgical procedure, without notice to the father. The district court properly recognized that under certain extraordinary circumstances, a parent's custodial rights may be temporarily terminated without notice, provided a meaningful post-deprivation remedy is made available.

The order transferring custody was filed at 2:11 p.m. on Wednesday, the 27th of November 1985. It provided for a December 2nd post-deprivation probable cause hearing. Immediately upon entry of the temporary custody order, however, Carl was taken by DFACS to the hospital by ambulance, and a surgical consent form was signed that afternoon at 4:25 p.m. Before 5:00 o'clock

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[1] Pamela S. Dempsey, the caseworker, Sue B. Terry and Nancy J. Pendergraft, supervisors.

[2] Medical Personnel Pool of Atlanta, Inc., a Georgia corporation, and its employee, home care nurse supervisor, Nancy J. Harrison.

[3] Drs. Klaus, Cohen and Weil Orthopaedic Associates, P.C., a Georgia professional corporation, and a member of the P.C., Dr. Richard Cohen.

p.m., Bendiburg was telephonically notified of the temporary transfer of custody, of his son's admittance to the hospital, of the scheduled surgical procedure, and of the post-deprivation hearing to be held on December 2. There was no intention to have a hearing on the propriety of the surgical consent. The procedure took place the next morning, and the following day Carl was taken to a foster home where he remained until December 2, 1985, when custody was restored to the father after the hearing.

The validity of the temporary custody order and the consent to surgery, both for constitutional and state law battery purposes, turns on whether such an emergency existed, or was thought to exist by the state employees, so as to make constitutional what would be unconstitutional in the absence of a medical emergency, and insulate the actors from a state law claim for battery on the basis of good faith and medical emergency. As we understand the district court's orders, this is the issue that was thought to be in dispute, and prevented the granting of summary judgment to all defendants on all issues. We sustain the district court's decision on this point.

To maintain a 42 U.S.C.A. § 1983 action, the conduct complained of must have been committed by a person acting under color of state law and must result in a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); *Scott v. Dixon*, 720 F.2d 1542, 1545 (11th Cir.1983); *Brown v. Miller*, 631 F.2d 408, 410 (5th Cir.1980).

The district court correctly held that *the father has no substantive due process claim*. Substantive due process prohibits the government from engaging in certain activity regardless of the procedure used to implement that activity. Since the government may intervene in the family relationship when following proper procedures upon appropriate facts, Bendiburg has no constitutional right which can survive procedural due process. *See Cruzan v. Director, Missouri Department of Health*, ___ U.S. ___, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). Under the facts of this case, the district court held that circumvention of parental authority for a five-day period did not rise to a level sufficiently egregious or shocking to sustain a substantive due process claim with respect to severance of the parent-child relationship. The court likewise held that Carl's estate did not make out a claim in this regard.

As to the *procedural due process claim*, the district court properly held that the liability of the state employees turns on whether the notice and post-deprivation hearing were adequate under the circumstances, and denied summary judgment on this claim, but granted summary judgments to the treating physicians and home care nurses.

The private defendants can be held liable in a § 1983 action if they act in concert with the state officials in depriving a plaintiff of constitutional rights. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1987). *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). This Court recently set forth the requirements of a § 1983 conspiracy:

> The plaintiff attempting to prove such a conspiracy must show that the parties "reached an understanding" to deny the plaintiff his or her

> rights. *Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); *Strength* [*v. Hubert*], 854 F.2d [421] at 425 [(11th Cir. 1988)] (citations omitted). The conspiratorial acts must impinge upon the federal right; the plaintiff must prove an actionable wrong to support the conspiracy. *Sadie v. Martin*, 468 So.2d 162, 167 (Ala. 1985); *Strength*, 854 F.2d at 425.

N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1563 (11th Cir.1990). In *Addickes*, 398 U.S. at 155-56, 90 S.Ct. at 1607 (1970), the Supreme Court concluded "that the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors."

The district court held that the record does not reveal the conspiracy which plaintiff alleges or the kind of joint action necessary to support a claim of state action on the part of the private defendants. The court therefore granted summary judgment to each private defendant on the procedural and substantive due process claims.

Bendiburg correctly argues, in our judgment, that the district court wrongfully required him to produce a "smoking gun" when nothing more than an "understanding" and "willful participation" between private and state defendants is necessary to show the kind of joint action that will subject private parties to § 1983 liability.

If the private defendants intentionally exaggerated the emergency nature of Carl's medical problems, and indeed did this for the purpose of supplying the state officials with the necessary facts to obtain *ex parte* temporary custody on a court order with the implied approval for a consent to the surgical procedures, they have acted

in concert with the state actors in such a way as to subject them to liability for a § 1983 cause of action, under the cases that have been decided since *Dennis v. Sparks*. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n. 6, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1981) (acts of private party attributable to state when private party acts in concert with state actors); *Strength v. Hubert*, 854 F.2d 421 (11th Cir.1988) (conspiratorial acts must impinge upon federal right); *Dykes v. Hosemann*, 743 F.2d 1488, 1498 (11th Cir.1984), *vacated*, 776 F.2d 942 (11th Cir.1985), *reinstated*, 783 F.2d 1000 (11th Cir.), *cert. denied*, 479 U.S. 983, 107 S.Ct. 569, 93 L.Ed.2d 574 (1986) (plaintiff must demonstrate understanding reached to violate his rights).

The facts as they develop may well show that all of the representations as to required medical care were accurate, or reasonably thought to be accurate, and the private parties left it to the state actors to legally obtain the consent that they sought. This cannot be decided on summary judgment, however, as there are issues of fact concerning the emergency requirement of the recommended medical procedure. We, therefore, reverse the district court's order insofar as it granted summary judgment to these private defendants on the § 1983 due process claim.

Of course, this reversal does not apply to defendant Dr. Baheeg Shadeed, who was entitled to summary judgment on the § 1983 due process claim because he did not come on the scene until after the procedures for the consent were instituted.

As to the *state law battery claim*, the district court examined each defense asserted by the defendants and

determined that issues concerning the immediacy of the medical situation prevented summary judgment as to all defendants. The district court found a question of fact with respect to the necessity of medical treatment, the basis for DFACS' authority to consent to the surgical procedure.

In the absence of consent, surgery constitutes battery. *See Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir.1987). In the face of a life-threatening emergency, DFACS would have had an obligation to take some action. Tension between these two principles creates the issues of fact in this case. The court viewed the surgical procedure performed, if in the nature of a non-emergency, as falling within the realm of a retained parental right.

Although the surgeon, Dr. Baheeg Shadeed, makes a strong argument that he is immune from tort liability under O.C.G.A. § 31-9-6(c) because of his good faith reliance on the consent of the state agency, we cannot now fault the decision of the district court to deny summary judgment and wait for a full development of the facts to determine whether Dr. Shadeed, or the other defendants, met the good faith requirement of that statute.

On the claim of unconsented, non-emergency medical treatment, the district court denied summary judgment on both the *substantive and procedural due process claims asserted on behalf of Carl's estate*. This decision must be sustained as turning on the critical factual issues concerning the validity of the consent to the medical procedure, as well as the estate's procedural due process

claim for severance of the familial bond between parent and child.

The decision on these motions for summary judgment should not be taken as delivering an opinion or prediction on the eventual outcome of this case. The basic and complex legal issues will be more fully informed after the district court is able to view the evidence produced at trial, and after the court has made findings of fact or a properly instructed jury has resolved the critical factual issues.

Underlying this lawsuit are important issues of state responsibility and individual rights. The state has an interest in protecting the health, safety, and welfare of children residing within its borders. Parental autonomy may be limited when parental decisions jeopardize the health or safety of a child, and the state can intercede on the child's behalf. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1980). *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Georgia's establishment of DFACS is an attempt to ensure the welfare of its children. Responding further to society's compelling need to protect the health, safety, and welfare of the children within its borders, Georgia's enactment of O.C.G.A. § 15-11-17 empowers DFACS to act in a situation of medical neglect.

The need for government officials to act in an emergency is an important public policy consideration. The doctrine of qualified immunity acts as a shield to protect state actors from civil liability unless the official is plainly incompetent, knowingly violates the law, *Malley v. Brigg*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271

(1986), or by his conduct violates clearly established statutes or constitutional rights of which a reasonable person should have known. *Harlowe (sic) v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Mere negligence does not rise to the level of a Fourteenth Amendment violation, *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

On the other hand, neither the state nor private actors, concerned for the medical needs of a child, can willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children. "[P]arents have the right to decide free from unjustified governmental interference in matters concerning the growth, development and upbringing of their children." *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305, 313 (11th Cir.1989). The Due Process Clause prevents government from abusing its power, or employing its power as an instrument of oppression. *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, ___, 109 S.Ct. 998, 1003-04, 103 L.Ed.2d 249, 259 (1989).

Bendiburg does not make a claim that Georgia's Juvenile Code is facially unconstitutional, but questions whether a post-deprivation hearing was constitutionally adequate in this case. Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982). A factual determination of whether or not the post-deprivation remedy for the temporary custody order and the consent to surgery was sufficient is the proper focus in this case.

There is some argument that the failure of Bendiburg to act when notified at 5 p.m. the night before surgery amounted to a consent which defeats his claim. These facts can be fully developed at trial without the court being constrained by the limits of a summary judgment record.

AFFIRMED in part and REVERSED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA ATLANTA DIVISION

HARRY A. BENDIBURG, Individually and as Administrator of the Estate of Carl Bendiburg, Deceased,	:	CIVIL ACTION NO. 1:87-CV-1774-JOF
Plaintiff,	:	(Filed
vs.	:	JUL 03 1989)
PAMELA S. DEMPSEY, et al.,	:	
Defendants.	:	

ORDER

This matter is before the court on defendants' second motions for summary judgment, Fed. R. Civ. P. 56; and plaintiff's motion for certification of order. Fed. R. Civ. P. 54(b). By order entered January 5, 1989, defendants' first motions for summary judgment were granted in part and denied in part. In so ruling, the court observed that the parties had failed to address any claim or claims brought pursuant to 42 USC §1983 by plaintiff in his capacity as administrator of the estate of his son, Carl Bendiburg.[1] *Bendiburg v. Dempsey*, 707 F. Supp. 1318, No. 87-1774, Slip Op. at 42 n. 21 (N.D.Ga. January 5, 1989). Defendants were therefore invited to file summary judgment motions

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[1] As opposed to his individual capacity. Thus, while the court has considered plaintiff's own alleged constitutional injury, this is its first opportunity to determine whether Carl suffered a similar deprivation.

on this issue. *Id.* They have accepted this invitation, and the matter is now ripe for the court's consideration.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

I. STATEMENT OF FACTS.[2]

Plaintiff's minor son, Carl, suffered a serious injury to his left leg in an automobile accident September 15, 1985. The leg subsequently developed an infection which required the intravenous application of antibiotics to treat. Carl's treatments continued after his release from the hospital, and defendants Medical Personnel Pool of Atlanta and Nancy J. Harrison were retained for this purpose. When these defendants encountered problems in administering Carl's medication, plaintiff was asked to consent to the insertion of a Hickman catheter into Carl, a device which would permit direct administration of the prescribed medication. After discussing the matter with several physicians, plaintiff declined to consent to the procedure.

Defendants' difficulties in administering Carl's medication continued. For this reason, on November 27, 1985, defendant Harrison was instructed by defendant Richard Cohen to contact the Cobb County Department of Family and Children Services (DFACS) at which time she spoke with defendant Pamela S. Dempsey. Following her conversation with defendant Harrison, defendant Dempsey

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[2] The facts material to the present motions have been detailed previously. *Id.*, Slip Op. at 1-7. They will therefore only be summarized here.

successfully petitioned the Juvenile Court of Cobb County for an *ex parte* order temporarily transferring custody of Carl from plaintiff to DFACS. Through defendant Dempsey, DFACS consented to the Hickman catheter procedure. Defendant Baheeg Shadeed inserted the catheter in Carl the next morning.

The day following the procedure, November 29, 1985, Carl was discharged from the hospital and sent to a foster home where he remained until December 2, 1985. On that day, a hearing was held before the Juvenile Court at which time custody of Carl was finally restored to plaintiff. Less than two weeks later, Carl suffered a massive pulmonary embolus and died. It is plaintiff's contention that the embolus was caused by insertion of the Hickman catheter in Carl. The question now before the court is whether plaintiff can identify and present evidence demonstrating that Carl was deprived of a recognized constitutional right without due process of law.

II. CONCLUSIONS OF LAW.

A. The Non-State Defendants.

The two essential elements to a claim under §1983 are (1) that the conduct complained of deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and (2) that this conduct was committed by a person or persons acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). The court has previously determined that evidence of state action is lacking as to defendants Harrison; Drs. Klaus, Cohen and Weil Orthopaedic Associates, P.C.; Cohen; and Shadeed.[3] *Bendiburg*, Slip Op. at 15-24.

Accordingly, as to these defendants, summary judgment is GRANTED. The Court must now determine whether plaintiff has identified evidence establishing that Carl suffered a constitutional deprivation at the hands of the state defendants.

B. The State Defendants.

1. Actions For Wrongful Death vs. Survival Actions.

Under Georgia law, certain persons are entitled to bring an action at law for the damages sustained by them by virtue of the wrongful death of another. O.C.G.A. §51-4-1, *et seq.* Where, as here, the deceased is a child, §19-7-1[4] provides in relevant part, "If the deceased child does not leave a spouse or child, the right of recovery [for his or her wrongful death] shall be in the parent or parents [or] if either parent is deceased, the right shall be in the surviving parent." O.C.G.A. §19-7-1(c)(2)(B). Thus, Georgia law authorizes plaintiff to maintain an action at law for the wrongful death of his son, Carl. *See Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), *cert. den.*, 368 U.S. 921 (1961). Defendants argue, however, that plaintiff has no standing to sue for Carl's wrongful death in his capacity as administrator of Carl's estate. Reply at 4. The court agrees. Because the federal civil rights statutes are silent as to survivorship of actions, the courts must look to the law of the forum state. *Gilmere v. City of Atlanta*, 737 F.2d

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[3] Defendant Medical Personnel Pool was not made a defendant to plaintiff's §1983 claims.

[4] Incorporated by reference in §51-4-4.

894, 898-9 n.8 (11th Cir. 1984) (citing *Brazier*); *see also McQurter v. City of Atlanta*, 572 F. Supp. 1401, 1422 (N.D.Ga. 1983) (Forrester, J.). Under Georgia law, only those tort claims which the decedent may have brought during his lifetime survive to his personal representative. O.C.G.A. § 9-2-41. Thus, while plaintiff in his individual capacity may maintain his present action for Carl's wrongful death under §1983, O.C.G.A. §§ 51-4-4, 19-7-1, no such claim exists in his favor as administrator of Carl's estate. Thus, to the extent plaintiff sues in his capacity as administrator for Carl's wrongful death, defendants' motion for summary judgment is GRANTED. The court now turns its attention to the claims, if any, possessed by Carl the instant before his death. *Gilmere*, 737 F. 2d at 898-9 n.8.

2. Severance of the Parent-Child Relationship.

The substantive due process component of the fourteenth amendment prohibits a state from engaging in certain activity regardless of the procedures utilized and thereby serves to prevent governmental power from being used for purposes of oppression. *Daniels v. Williams*, 474 U.S. 327, 330 (1985). With respect to the severance of the parent-child relationship, the court reaffirms its earlier conclusion that the evidence of record fails to suggest state conduct so shocking or egregious as to support a substantive due process claim. *Bendiburg*, Slip Op. at 8-11. Accordingly, this aspect of defendants Dempsey, Pendergraft and Terry's second motion for summary judgment is GRANTED.

Unlike substantive due process claims, claims brought for vindication of procedural due process rights challenge the constitutional adequacy of the procedures established by the state in determining how to treat individuals in a particular instance. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986). A party asserting such a claim must demonstrate (1) that he has suffered the deprivation of a constitutionally protected right, and (2) that the procedures implemented by the state to effect this deprivation were constitutionally inadequate. *Bendiburg*, Slip Op. at 11-12.

Due process requires that state-effected severances in the parent-child relationship occur only with rigorous protections for the individual liberty interests at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). The court has addressed at length the extent of a parent's interest in the custody of his or her child. *Bendiburg*, Slip Op. at 12-15; 36-37. Plaintiff maintains that "it would indeed be anomalous to conclude that the parent's interest [in maintaining the parent-child relationship] is protected while the child's is not." Response at 3. The court agrees. This principle has been described as "the reciprocal liberty interest of parent and child in the familial bond between them." *Duchesne v. Sugarman*, 566 F.2d 817, 825 n. 19 (2d Cir. 1977) (quoting Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 649-50 (1977)). As the Second Circuit Court of Appeals has stated,

> [W]e are concerned with the most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive

> interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the "companionship, care, custody and management of his or her children," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and of the children in not being dislocated from the "emotional attachments that derive from the intimacy of daily association," with the parent, *Smith v. OFFER*, 431 U.S. 816, 844 (1977).

Id. The court agrees with this reasoning and concludes that Carl indeed possessed a protected liberty interest in his relationship with plaintiff. Accordingly, this aspect of defendants' motion for summary judgment is DENIED.

3 Subjection to Non-Emergency Medical Treatment.

Plaintiff contends that by subjecting Carl to the Hickman catheter procedure, defendants caused him unnecessary pain in violation of a constitutionally protected liberty interest. As described in the court's earlier order, the evidence of record shows that DFACS through defendant Dempsey consented to the Hickman catheter procedure on Carl's behalf without first investigating his actual medical condition, the extent of his need for the procedure, or the procedure itself. Where, as here, a civil rights claimant charges state officials with the failure to exercise an affirmative duty, it must be shown that the omission violated a constitutionally protected interest and that the officials displayed at least deliberate

indifference[5] in connection with the performance of their duties. *Taylor v. Ledbetter*, 818 F.2d 791, 793-94 (11th Cir. 1987) (en banc). Plaintiff carries this burden.

First it is clear that as his temporary legal guardian, the state owed Carl an affirmative duty. Such duties obligating the state to protect private citizens' health and safety arise from special custodial or other relationships. *Id.* at 797. Thus, when DFACS assumed temporary legal custody of Carl, it likewise assumed responsibility for his physical well-being. Second, a minor child possesses a liberty interest in not being subjected by the state to unnecessary medical treatment. *Parham v. J.R.*, 442 U.S. 584, 600 (1979); *see also Taylor*, 818 F.2d at 794 (right to be free from unnecessary infliction of pain). If, as plaintiff claims, Carl had no actual emergency medical need for insertion of the catheter, this liberty interest is implicated. Finally, the evidence of record could reasonably support a finding that through defendants' deliberate indifference to the duties of their office, Carl was unnecessarily subjected to the extraordinarily intrusive Hickman catheter procedure. Indeed, as plaintiff points out, it appears defendants need only have discussed the matter with defendant Shadeed, the physician who implanted the catheter in Carl, to discover his view that the case presented no emergency medical situation. The court finds

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[5] The en banc panel in *Taylor* held that a minor in state custody may maintain a §1983 action based on the fourteenth amendment under the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976). *Taylor*, 818 F.2d 795-96. Defendants argue that *Taylor* does not support a due process claim brought on behalf of Carl's estate. Reply at 2-4. The court disagrees.

that a question of fact exists as to whether Carl was deprived of this liberty interest in violation of both the substantive and procedural components of the due process clause of the fourteenth amendment. Accordingly, this aspect of defendants' motion for summary judgment is DENIED.

PLAINTIFF'S MOTION FOR CERTIFICATION OF ORDER

Plaintiff's motion for certification is directed toward the court's order of January 5, 1989, and is brought pursuant to Rule 54(b). This rule provides

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Consistent with the court's order of March 14, 1989,[6] and for good cause shown, plaintiff's motion for certification is GRANTED. The court determines that there is no just reason to delay the entry of final judgment as to the parties and claims dismissed by the court's January 5, 1989 order. Accordingly, the Clerk of Court is DIRECTED to enter final judgment consistent with that order. In addition, the court is of the opinion that the present order

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[6] Wherein the court granted defendants' motion to amend the court's January 5, 1989 order pursuant to 28 U.S.C. §1292(b) to allow for interlocutory appeal.

involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may likewise materially advance the ultimate termination of this litigation. *See* 28 U.S.C. §1292(b).

CONCLUSION

In sum, defendants Harrison; Drs. Klaus, Cohen and Weil Orthopaedic Associates, P.C.; Cohen; and Shadeed's second motions for summary judgment on Court One of plaintiff's complaint are GRANTED. In addition, defendants Dempsey, Pendergraft and Terry's second motion for summary judgment on Count One of plaintiff's complaint is GRANTED IN PART and DENIED IN PART as provided within the body of this order. Finally, plaintiff's motion for certification of the court's January 5, 1989 order is GRANTED.

SO ORDERED this 30th day of June, 1989.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

APPENDIX C

Harry A. BENDIBURG, Individually and as Administrator of the Estate of Carl Bendiburg, Deceased, Plaintiff,

v.

Pamela S. DEMPSEY; Sue Terry; Nancy J. Pendergraft, Individually and as Officials of the Cobb County Department of Family & Children Services; Cobb County Department of Family & Children Services; Nancy Harrison; Medical Personnel Pool of Atlanta, Inc.; Richard Cohen, M.D.; Klaus, Cohen & Weil, Drs., Orthopaedic Associates, P.C.; Baheeg Shadeed, M.D., Defendants.

Civ. A. No. 1:87-CV-1774-JOF.

United States District Court,
N.D. Georgia,
Atlanta Division.

Jan. 5, 1989.

ORDER

FORRESTER, District Judge.

This matter is before the court on defendants' motions for summary judgment. Fed.R.Civ.P. 56. These motions will be addressed following a detailed statement of the relevant facts.

I. STATEMENT OF FACTS.

A. *The Parties.*

Plaintiff Harry D. Bendiburg brings this action both in his individual capacity as well as in his capacity as administrator of the estate of his son, Carl Austin Bendiburg (hereinafter "Carl"). Named as defendants are (1) the Cobb County Department of Family and Children

Services (hereinafter "DFACS") and three DFACS officials, Pamela S. Dempsey, Sue B. Terry, and Nancy J. Pendergraft; (2) Sallie T. Walker, Judge Pro Tempore of the Juvenile Court of Cobb County; (3) Cobb County, a political subdivision of the State of Georgia; (4) Medical Personnel Pool of Atlanta, Inc. (hereinafter "Med Pool"), a Georgia corporation, and a Med Pool employee, Nancy J. Harrison; (5) Drs. Klaus, Cohen and Weil Orthopaedic Associates, P.C. (hereinafter "the P.C."), a Georgia professional corporation, and a member of the P.C., Dr. Richard Cohen; and (6) Adventist Health Systems/Sunbelt, Inc., d/b/a Smyrna Hospital (hereinafter "Smyrna Hospital"), a Georgia corporation, and a member of its hospital staff, Dr. Baheeg Shadeed.

The court dismissed defendants Walker and Cobb County from this action July 13, 1988.[1] The remaining defendants' motions for summary judgment will be collectively considered herein. They are alleged to be liable under plaintiff's due process claim on the theory that they conspired to cause plaintiff's constitutional injury (Count I).[2] Similarly, defendants are alleged to be liable to plaintiff for the tort of battery on the theory that effective consent was lacking and that they all acted to cause the alleged injury (Count II).[3]

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[1] Defendant Smyrna Hospital was dismissed from this action with prejudice by stipulation between the parties filed December 14, 1987.

[2] Apparently defendant Med Pool had been excluded from plaintiff's procedural due process claim.

[3] Defendant Pendergraft has been excluded from plaintiff's battery claim.

B. *Events.*

The events giving rise to this action are as follows. On September 15, 1985, plaintiff's son, Carl, was seriously injured in an automobile accident and admitted to Smyrna Hospital for treatment. Carl remained in Smyrna Hospital where he received inpatient care until his release November 9, 1985. Throughout the period of his hospitalization, Carl was treated by numerous physicians from various medical specialties. During this time, however, defendant Cohen was his primary treating physician. Among Carl's injuries was a compound fracture of the left leg. Because of the serious nature of this injury, Carl developed an osteomyelitis, or continuing bone infection, in his left leg which required the intravenous (IV) application of antibiotics to treat.

Because of this bone infection and for other reasons relating to his injuries, Carl continued to receive nursing care in his home furnished by defendant Med Pool.[4] Among the responsibilities of the Med Pool nurses, including defendant Harrison,[5] was to ensure that Carl continued to receive the proper dosage of IV medication prescribed for his continuing infection.

During the period of Carl's home care, venous access became difficult due to the collapse of Carl's peripheral

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[4] Defendant Med Pool provided no care for Carl prior to his November 9, 1985 release from Smyrna Hospital.

[5] Defendant Harrison took over the supervision of Carl's care for defendant Med Pool on November 19, 1985.

veins. As a consequence, the Med Pool nurses experienced considerable difficulty in administering the prescribed IV medication to Carl causing him to miss an unspecified number of dosages.[6] For this reason, plaintiff was asked by Carl's attending physicians and the Med Pool nurses[7] to consent to the insertion of a Hickman catheter, described as "a long silicone rubber catheter which is inserted in either the subclavian (collar bone) or jugular (neck) vein and then threaded through the patient's upper venous system to the juncture of the superior vena cava and the right atrium of the patient's heart." Plaintiff's Response to Defendant Shadeed's Motion for Summary Judgment at 4. This device would allow direct administration of the prescribed medication and dispense with the need for the peripheral IVs. The Hickman catheter would not have been Carl's first central venous catheter. Approximately ten days after his initial hospitalization, Carl received a subclavian vein catheter. When this catheter failed, a second was inserted October 3, 1985 and a third two days later, Plaintiff claims this poor success rate together with the risks and available alternatives as explained to him by defendant Shadeed

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[6] Plaintiff does not dispute this fact. He points out, however, that most of the Med Pool nurses assigned to treat Carl either could not or would not restart the IVs once they failed. A non-Med Pool nurse, June Yearwood Green of Northside Hospital, was called to Carl's home on no less than seven occasions to restart Carl's IVs.

[7] Defendant Harrison discussed the Hickman catheter with plaintiff on several occasions between November 19 and November 25, 1985.

and other physicians prompted him to decline the procedure. When this information was conveyed to defendant Shadeed, he responded that he had "no problem" with plaintiff's decision.

Carl was scheduled to meet with defendant Cohen on the afternoon of November 25, 1985. On that date, apparently concerned by the difficulties encountered with Carl's IV treatment and plaintiff's refusal to consent to the Hickman catheter, defendant Harrison contacted DFACS. Speaking to an unidentified DFACS official, defendant Harrison inquired into DFACS' procedures and asked what DFACS could do about Carl's situation. She was told DFACS could intervene only if a physician would state that Carl's failure to receive the Hickman catheter was "a problem."[8] Carl's appointment with defendant Cohen for that day was subsequently cancelled and re-scheduled for Wednesday, November 27, 1985, the day before the Thanksgiving holiday.[9]

On November 26, 1985, defendant Harrison phoned defendant Cohen and informed him that she had contacted DFACS and explained what she had been told by the unidentified DFACS official. The next day,[10] after

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[8] Though this was defendant Harrison's first contact with DFACS, a co-employee of defendant Med Pool, has testified that defendant Harrison mentioned the possibility of DFACS' involvement several days earlier. Steiner Deposition at 27-28.

[9] It is unclear whether Carl's appointment was rescheduled before or after defendant Harrison's conversation with DFACS.

[10] The day rescheduled for Carl's appointment with defendant Cohen.

again trying to obtain plaintiff's consent to the Hickman catheter, defendant Cohen telephoned plaintiff's sister-in-law, Tersi Bendiburg, and told her, *inter alia*, a change of custody was a possibility if plaintiff continued to withhold his consent. Defendant Cohen also telephoned defendant Shadeed and told him that a court order had been or would be obtained and asked him to insert the Hickman catheter.

At approximately noon on that day defendant Cohen instructed defendant Harrison to place a second call to DFACS at which time she spoke with defendant Dempsey. Defendant Harrison informed defendant Dempsey of the circumstances regarding Carl's infection, his need for the prescribed antibiotics, his perceived need for the Hickman catheter, and plaintiff's refusal to consent to the procedure. After conferring with her supervisor, defendant Terry, and without any further investigation, defendant Dempsey then prepared and presented to the Juvenile Court of Cobb County an *ex parte* deprivation petition pursuant to O.C.G.A. § 15-11-23, *et seq.* After hearing the matter, defendant Walker, acting as Judge Pro Tempore of the Juvenile Court of Cobb County, entered an *ex parte* order transferring temporary custody of Carl to DFACS and scheduled a hearing for the following Monday, December 2, 1985; i.e., the first available court date after the Thanksgiving holiday.

With temporary legal custody vested in DFACS, defendant Dempsey went to defendant Cohen's office to speak with him about Carl. Defendant Cohen advised defendant Dempsey that he and defendant Shadeed both

agreed Carl should be immediately hospitalized for insertion of the Hickman catheter. Carl was then transported by ambulance to Smyrna Hospital followed by Defendant Dempsey. Upon her arrival, defendant Dempsey executed a surgical consent form on behalf of DFACS. She then contacted plaintiff to inform him of these events. Carl stayed in the hospital overnight during which time the Smyrna Hospital nurses successfully administered Carl's antibiotics intravenously through a peripheral vein with apparently no difficulty.

Defendant Shadeed arrived at the hospital the next morning to perform the procedure. Sometime after his arrival, defendant Shadeed was shown both the juvenile court order and the executed surgical consent form. He then proceeded to implant the Hickman catheter in Carl without complications. The next day, Carl was discharged from the hospital and sent to a foster home where he remained until December 2, 1985. On that day, a probable cause hearing was held before the juvenile court. Plaintiff attended and was represented by counsel. Plaintiff was given an opportunity to request a hearing wherein DFACS would bear the burden establishing actual deprivation, but apparently declined. Custody of Carl was restored to plaintiff through a consent agreement between plaintiff and DFACS, and plaintiff had no further contact with DFACS after the hearing. Less than two weeks later, Carl suffered a massive pulmonary embolus and died. This action followed.

II. CONCLUSIONS OF LAW.

Defendants' summary judgment motions must be granted if "there is no genuine issue as to any material fact and . . . [they are] entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Defendants bear the initial burden of demonstrating that no genuine issue of material fact exists in the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The burden then shifts to plaintiff "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. at 2553. Thus, to survive defendants' motions for summary judgment, plaintiff must come forward with specific evidence of every element material to his case so as to demonstrate the existence of triable issues. *Id.*

A. *42 U.S.C. § 1983.*

1. Due Process.

Plaintiff's § 1983 claim is brought under the due process clause of the fourteenth amendment. While defendants concede that parental rights are among those protected by the fourteenth amendment, it is their position that plaintiff was not deprived of these rights without due process of law.

a. substantive due process.

Substantive due process prohibits the states from engaging in certain activity regardless of the procedures used to implement them and thereby serves to prevent

governmental power from being used for purposes of oppression. *Daniels v. Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1985) (citing *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1499-1500 (11th Cir. 1985). A substantive due process claim may therefore be asserted in federal court regardless of the existence of a parallel state remedy. *Gilmere*, 774 F.2d at 1500.

It has been settled law for the better part of this century that governmental interference with the parent-child relationship can rise to the level of a substantive due process violation. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 43 S.Ct. 625, 626-27, 67 L.Ed.1042 (1923). While "[d]efining the exact scope of a substantive due process claim is by its nature an imprecise task," *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1440 (11th Cir.1985), it is known that violations giving rise to such claims are necessarily more egregious than those which give rise to simple tort actions. *Gilmere*, 774 F.2d at 1500. "[N]ot every wrong committed by a state actor rises to the level of a constitutional tort sufficient to trigger a substantive due process violation." *Lee v. Hutson*, 810 F.2d 1030, 1032 (11th Cir.1987). The most widely accepted view is that substantive due process is violated by government conduct that "shocks the conscience" or when the government

engaged in action "which offends those canons of decency and fairness which express the notions of justice of English speaking peoples." *Rochin*, 342 U.S. at 169, 72 S.Ct. at 208 (quoting *Malinski v. New York*, 324 U.S. 401, 416-17, 65 S.Ct. 781, 788-89, 89 L.Ed. 1029 (1945)); *see also Gilmere*, 774 F.2d at 1500; *Fundiller*, 777 F.2d at 1440; *Sheley v. Dugger*, 824 F.2d 1551, 1555 (11th Cir.1987); *Everett v. Napper*, 833 F.2d 1507, 1513 (11th Cir.1987); *O'Neal v. DeKalb County*, 850 F.2d 653, 656 (11th Cir.1988). The question before the court is thus whether the evidence of record suggests state conduct that was so shocking or egregious as to give rise to a claim for damages under the concept of substantive due process. *Lee*, 810 F.2d at 1032. The court finds that it does not.

One of the court's most difficult tasks in properly applying the law to this case is separating the relevant facts from the overall tragedy this case presents. The kidnapping and murder of one's child by state officials under the color of state law would unquestionably present a substantive due process claim of the highest magnitude. But that is *not* what this case presents. Rather, the issue presently before the court is whether plaintiff's substantive due process rights were violated under the facts of this case when defendants caused legal custody of Carl to be removed from plaintiff for a period of five days. In analyzing plaintiff's substantive due process claim within this framework, the court must concern itself with those rights which the state may not take away. *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir.1987). In this regard, it has been determined that parental rights cannot be taken away by the use of excessive force, *Smith v. City of Fontana*, 818 F.2d 1411, 1419-20

(9th Cir.1987), or by officials of neighboring states. *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (6th Cir.1987). In contrast to such examples of constitutionally offensive conduct, however, the facts relevant to the instant substantive due process claim are not so shocking or egregious as to suggest that defendants' actions were taken for the purposes of oppression. The court therefore does not believe that defendants' conduct in this instance amounts to the sort of affirmative abuse of governmental power which the substantive protections of the due process clause are designed to prevent. Accordingly, this aspect of defendants' motions for summary judgment must be GRANTED and plaintiff's substantive due process claim DISMISSED.

b. procedural due process.

In contrast to claims brought for vindication of substantive due process rights, procedural due process claims concern expectations created by state law. *Taylor*, 818 F.2d at 794. Specifically, such claims challenge the constitutional adequacy of the procedures established by the state in determining how to treat individuals in a particular instance. *Gilmere*, 774 F.2d at 1500. Thus, a party bringing a procedural due process claim must demonstrate (1) that he has suffered a deprivation in the constitutional sense, and (2) that the procedures implemented by the state to effect this deprivation were constitutionally inadequate. *Smith v. OFFER*, 431 U.S. 816, 847, 97 S.Ct. 2094, 2111, 53 L.Ed.2d 14 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791,

796, 39 L.Ed.2d 52 (1974). The court will analyze plaintiff's procedural due process claim in light of these requirements.

As the court has stated, a parent's interest in the custody of his or her child is a liberty interest entitled to constitutional protection. *Lehr v. Robertson*, 463 U.S. 248, 256-65, 103 S.Ct. 2985, 2990-95, 77 L.Ed.2d 614 (1983). There can therefore be no doubt that plaintiff has suffered a deprivation in the constitutional sense. It is equally well established, however, that a state has a legitimate governmental interest in the health, safety and welfare of the children within its borders. *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551 (1971). It is inevitable, therefore, that these interests will, from time to time, come into conflict. When this occurs, and when it is determined that the state's interest outweighs that of the parent, the state may, under certain limited circumstances, move to terminate the parent's right to custody. This can only be legally accomplished, however, if the state implements and follows procedures meeting the requirements of the due process clause. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982). At a minimum, this requires that the parent be afforded notice and an opportunity for hearing. *Application of Gault*, 387 U.S. 1, 31-34, 87 S.Ct. 1428, 1445-47, 18 L.Ed.2d 527 (1967). In most instances, this means that the state must provide the parent an opportunity to be heard *prior* to the termination of his or her parental rights. Under certain extraordinary circumstances, however – which necessarily must be more compelling than those justifying the termination decision in the first instance – the state may legally move to terminate the parent's custody rights without prior notice or opportunity for

hearing, provided a meaningful post-deprivation remedy is made available. *Smith*, 431 U.S. at 848, 97 S.Ct. at 2111. Thus,

> The necessity of quick action by the state or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the state's action at some time after the initial taking, can satisfy the requirements of procedural due process.

Parratt v. Taylor, 451 U.S. 527, 539, 101 S.Ct. 1908, 1914, 68 L.Ed.2d 420 (1980).

Referring to the December 2, 1985 post-deprivation hearing, defendants take the position that plaintiff was afforded all the process he was constitutionally due. While the foregoing discussion makes clear that meaningful post-deprivation remedies can satisfy the requirements of the due process clause, it is equally clear that such remedies are constitutionally inadequate under any set of facts unless predeprivation remedies are unavailable:

> Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 [102 S.Ct. 1148, 1158, 71 L.Ed.2d 265] (1982). Where . . . a deprivation of [a constitutionally protected interest] is authorized by an established state procedure and it is practicable for the state to provide pre-deprivation procedures, due process has been consistently held to require pre-deprivation notice and a hearing in order to reduce the possibility of a wrongful deprivation.

Fetner v. City of Roanoke, 813 F.2d 1183, 1186 (11th Cir.1987) (citing *Parratt*, 451 U.S. at 538, 101 S.Ct. at 1914; *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)). *See also Burch v. Apalachee Community Mental Health Services*, 840 F.2d 797, 801 (11th Cir.1988) (government officials abuse their state-clothed authority in depriving a person of a constitutionally protected interest when a pre-deprivation hearing is practicable). For the reasons set forth below, the court believes a question of fact exists as to the need to dispense with the pre-deprivation process.

Defendants note the State of Georgia's valid interest in protecting the welfare of the children within its borders and describe the state's approach to the interests of the parent when their interests conflict as follows:

> If a caseworker employed by DFACS is confronted with a situation where the health or welfare of a child is at stake or an emergency situation exists, DFACS' policy is to present the court with an *ex parte* order, notifying the parents once custody of the child has been obtained, and notify the parents of the post-deprivation hearing to be held within seventy-two (72) hours of the taking of custody.

Brief at 24. The question presently before the court, however, does not concern the State of Georgia's interest in child welfare nor the constitutionality of the procedures implemented to promote it. Rather, the narrow question presented by plaintiff's procedural due process claim is whether post-deprivation remedies were constitutionally adequate under the facts of this case. Put another way, the court must determine whether plaintiff has identified

and presented specific evidence calling into question the need – real or perceived – to forego pre-deprivation procedures. The court believes that he has.

Defendants present evidence indicating that the decision to obtain custody of Carl on an *ex parte* basis was made only after they learned that Carl was in immediate danger of dying or suffering the loss of his leg if the Hickman catheter was not inserted and further that plaintiff refused to consent to the procedure. *See* Dempsey Deposition at 46-49. This presents a most germane issue of fact. Whether this turns out to be an arrogantly self-assured officious intermeddling in a matter where reasonable minds could disagree or a necessarily hurried and unquestionably proper response to an immediate medical emergency must be resolved upon consideration of the proof at trial. Because a question of fact exists on this point, this aspect of defendants' motions for summary judgment must be DENIED.

2. The Private Defendants' Liability.

Because the fourteenth amendment is directed at the states, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). Similarly, section 1983 provides a cause of action only for those deprived of a constitutionally protected right "under color of state law." *Id.* Thus, a showing of state action is necessary to establish both the deprivation of a fourteenth amendment right and to meet the "under color of" state law requirement of § 1983. *See Burch v. Apalachee Community Mental Health*

Services, 840 F.2d 797, 802-803 (11th Cir.1988); *Carlin Communication v. Southern Bell*, 802 F.2d 1352, 1357 (11th Cir.1986).

State action requires both that the deprivation "be caused by the exercise of some right or privilege created by the state . . . or by a person for whom the state is responsible," and that each party charged be a "state actor." *Id.* In the case at bar, it is clear that the alleged deprivation was caused in part by persons for whom the state is responsible; i.e., DFACS and its officials. "[T]o act 'under color of' state law for section 1983 purposes does not require that the defendant be an officer of the state," however. *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S.Ct. 183, 186-87, 66 L.Ed.2d 185 (1980) (citing *Adickes v. S & H Kress and Company*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966)). Rather, each party charged with the deprivation need only be a person who may fairly be said to be a "state actor." *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753. This may be because he has obtained overt significant assistance from state officials, *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988), because he has acted in concert with state actors, *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n. 6, 102 S.Ct. 2764, 2770 n. 6, 73 L.Ed.2d 418 (1981), because his decisions and actions were overtly or covertly coerced or significantly encouraged by state officials, *West v. Atkins*, ___ U.S. ___, 108 S.Ct. 2250, 2257 n. 10, 101 L.Ed.2d 40 (1988), or because his authority was delegated to him by the state. *National Collegiate Athletic Association v. Tarkanian*, ___ U.S.

___, ___, 109 S.Ct. 454, 463, 102 L.Ed.2d 469 (1988).[11] It is plaintiff's primary theory of liability against the private defendants that they conspired with the state defendants "to seize custody of Carl so that the Hickman catheter could be implanted contrary to plaintiff's judgment." *See Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir.1988).

As noted by the parties, the generally accepted definition of a section 1983 conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results of damage." *See Earle v. Benoit*, 850 F.2d 836, 844 (1st Cir.1988); *Hobson v. Wilson*, 737 F.2d 1, 51 (D.C.Cir.1984); *Singer v. Wadman*, 595 F.Supp. 188, 270 (D.Utah 1982), *aff'd*, 745 F.2d 606 (10th Cir.1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985); *Richardson v. City of Indianapolis*,

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[11] This case is somewhat similar to *Tarkanian* in that it mirrors the traditional state action case. "In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action." *Id.* ___ U.S. at ___, 109 S.Ct. at 462. Here, as in *Tarkanian*, it was the state entity which actually caused plaintiff's alleged injury. "Thus, the question is not whether [the state defendants] participated to a critical extent in [the private defendants'] activities, but whether [the state defendants'] actions . . . turned [the private defendants'] conduct into state action." *Id.* In the final analysis, however, the question remains "whether the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the state." *Id.* ___ U.S. at ___, 109 S.Ct. at 465 (quoting *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753)).

658 F.2d 494, 500 (7th Cir.1981); *Rotermund v. US Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir.1973). Thus, for plaintiff to avoid summary judgment on his conspiracy theory of section 1983 liability, he must identify and present evidence that, *inter alia*, the private and state defendants "reached an understanding" or had a "meeting of the minds" to violate his constitutional rights. *See Strength*, 854 F.2d at 425; *Dykes v. Hosemann*, 743 F.2d 1488, 1498 (11th Cir.1984), *vacated*, 776 F.2d 942 (11th Cir.1985), *reinstated*, 783 F.2d 1000 (11th Cir.), *cert. denied*, 479 U.S. 983, 107 S.Ct. 569, 93 L.Ed.2d 574 (1986); *Collins v. Walden*, 834 F.2d 961, 964-65 (11th Cir.1987); *Scott v. Dixon*, 720 F.2d 1542, 1546-47 (11th Cir.), *cert. denied*, 469 U.S. 832, 105 S.Ct. 122, 83 L.Ed.2d 64 (1984); *Cole v. Gray*, 638 F.2d 804, 811-12 (5th Cir.), *cert. denied* 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981); *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir.1979); *Baker v. McDonald's Corp.*, 686 F.Supp. 1474, 1479-80 (S.D.Fla.1987). Plaintiff fails to carry this burden.

Plaintiff presents evidence which indicates that the private defendants may have considered seeking a custody order as early as November 12, 1985, as well as other evidence that could support a finding that the private defendants "conspired" among themselves to overstate the immediacy of the medical emergency which caused plaintiff to be deprived of his parental rights. None of plaintiff's evidence, however, supports the reasonable inference that this "conspiracy" involved one of the state defendants or any other state official. While plaintiff points out that the alleged "conspiratorial goal" could not have been achieved without the participation of each defendant, this fact is insufficient to demonstrate the requisite agreement between both the private and state

defendants. In the words of Justice White, "It is not enough to show that the state takes certain actions in response to [a] private decision." *Rendell-Baker*, 457 U.S. at 843, 102 S.Ct. at 2772; *see also Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). Furthermore, in the context of section 1983 liability, each conspirator must have been a willful participant – not just in the ultimate objective – but in the conspiracy as well. *Dennis*, 449 U.S. at 27, 101 S.Ct. at 186; *Adickes*, 398 U.S. at 152, 90 S.Ct. at 1605.[12] There is simply no evidence, circumstantial or otherwise, that the private defendants agreed with any of the state defendants to cause the deprivation of custody without notice and opportunity to be heard.

Citing *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir.1979), plaintiff argues that "the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus reached an understanding to achieve the conspiracy's objectives." While the court does not necessarily disagree with this argument, it is nevertheless clear that a party cannot be relieved of his evidentiary burden under Rule 56 merely because his constitutional injury is alleged to

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[12] The court is aware that plaintiff need not demonstrate that each defendant expressly agreed to and was aware of the details and exact limits of the illegal plan. *See Hampton*, 600 F.2d at 621. However, plaintiff still bears the burden of creating a question as to whether some sort of agreement was reached with the state defendants "to inflict a wrong against or injury upon [plaintiff]." *Id.*

have been caused by a conspiracy. "Much as a court cannot abdicate its responsibility to deny summary judgment when genuine issues of material fact exist, a court cannot circumvent its responsibility to grant summary judgment merely because a conspiracy is alleged." *Singer*, 595 F.Supp. at 274. For these reasons, the court hereby rejects plaintiff's conspiracy theory of section 1983 liability.

In the alternative to his conspiracy theory, plaintiff argues that "a private person's use of a state procedural law to effectuate a purpose not intended by state law and not permitted by the Constitution" will suffice to supply the requisite state action for section 1983 liability. In support of this argument, plaintiff cites *Motes v. Myers*, 810 F.2d 1055 (11th Cir.1987). In *Motes*, the plaintiff sought to impose section 1983 liability on a private defendant for swearing out a warrant resulting in her false arrest. Judge Ward of this district, having found state action lacking, granted summary judgment for the defendant and the court of appeals reversed. In so doing, the court, relying on *Lugar*, observed, "It would be anomalous indeed to hold a public official liable for deprivation of a party's constitutional rights under color of state law, and deny relief when a private party asserts an action pursuant to state law of similar deprivation of liberty or property." 810 F.2d at 1059.

It must first be noted that the court's holding was based entirely on a portion of the *Lugar* opinion which the Supreme Court expressly limited to deprivations arising from pre-judgment attachment of property.[13] *Lugar*,

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[13] Most courts have heeded this limitation and have declined to apply the *Lugar* opinion outside the context of

(Continued on following page)

457 U.S. at 939 n. 21, 942, 102 S.Ct. at 2755 n. 21, 2756. In any event, the court finds *Motes* distinguishable. In *Motes*, the private defendant personally swore out the arrest warrant which resulted in the plaintiff's constitutional injury.[14] Moreover, the defendant was advised to swear out the warrant by a law enforcement officer and was accompanied by a second officer to the plaintiff's home after midnight to serve the warrant. These facts supported the court's conclusion that the defendant "obtained significant aid from state officials" in effecting the plaintiff's false arrest. *Motes*, 810 F.2d at 1059; *see Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753 (private defendant

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pre-judgment attachments. *See, e.g., Deal v. Newport Datsun, Ltd.*, 706 F.2d 141, 142 (4th Cir.1983); *Dahlberg v. Becker*, 581 F.Supp. 855 (N.D.N.Y.), *aff'd*, 748 F.2d 85 (2d Cir.), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1845, 85 L.Ed.2d 144 (1984); *Wilson v. Pfeiffer*, 565 F.Supp. 115, 118 (S.D.N.Y.1983); *Lee v. Patel*, 564 F.Supp. 755, 759 (E.D.Va.1983); *Long v. Citizens Bank and Trust Co.*, 563 F.Supp. 1203, 1214-15 (D.Kan.1983).

The Court also notes that the *Lugar* opinion represents one of a series of Supreme Court opinions addressing private party liability under section 1983 in the context of state pre-judgment attachment proceedings. *See, e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W.T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

[14] In the case at bar, it was the state defendants – not the private defendants – who procured the controversial custody order and who thus arguably used state procedure to effectuate a wrongful purpose. Therefore, unlike *Motes*, the private defendants in the instant case are one step removed from this key event.

may be "state actor" if he obtains significant aid from state officials). For this reason, the court concludes that *Motes* falls within a line of cases not germane to the case at bar; i.e., *Scott v. Dixon*, 720 F.2d 1542 (11th Cir.1984) and *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

The *Scott* case involved a dispute arising out of the plaintiff's purchase of a truck from the defendant. Acting on advice given him by a state official, the defendant swore out an arrest warrant for the plaintiff. The defendant was then advised by the official – who issued the warrant – to take the warrant to the police for enforcement. Several months later, the defendant accompanied two police officers to the plaintiff's home and directed plaintiff's arrest pursuant to the warrant. The district court granted summary judgment for the defendant after concluding that he had secured the warrant as a private citizen. The court of appeals reversed finding a question of fact as to whether the defendant conspired with the state official to obtain the warrant, acted in bad faith in serving it, and used his position as chairman of the board of commissioners to procure its execution. *Scott*, 720 F.2d at 1546. In remanding the case back to the district court, however, the court emphasized that its holding was limited to cases presenting similar facts: "We in no way intimate that every affiant to a criminal warrant engages in state action of a constitutional dimension." *Id.*

In the *Morrison* case, the plaintiff's decedent was being treated by the defendant doctor at a county hospital for diabetes when it was determined that he was also suffering from alcohol withdrawal. The defendant then

instructed the hospital staff – who were county employees – to call the sheriff and have the plaintiff's decedent removed from the hospital. The officer who arrived at the hospital arrested the plaintiff's decedent after having been instructed to do so by the sheriff if the defendant doctor "approved." The plaintiff's decedent was then charged with public drunkenness and incarcerated and soon thereafter died from alcohol withdrawal. The district court granted summary judgment on the grounds that state action was lacking. In reversing, the court of appeals observed that the defendant doctor was a staff member of a county hospital, "approved" the arrest of plaintiff's decedent, and arranged for his confinement through county employees. On the basis of these facts, the court determined that the private defendant had "acted together with and obtained significant aid from state officials" in causing the decedent's constitutional injury. *Morrison*, 700 F.2d at 684.

As the foregoing discussion makes clear, *Motes*, *Scott*, and *Morrison* were cases in which it was determined that the private defendants acted concurrently with state officials in causing the plaintiffs' constitutional injuries. In the instant case, it is clear that the state defendants did not become involved with the events leading to plaintiff's constitutional injury until after the actions of the private defendants had been taken. Put another way, plaintiff has at most established that the private defendants agreed among themselves to arrange for the state defendants' intervention. None of plaintiff's evidence suggests that the state defendants played any part in the private

defendants' agreement and thus the *Motes* decision is inapplicable.[15]

In sum, the court concludes that plaintiff has failed to identify and present evidence demonstrating the existence of a conspiratorial agreement between the private and state defendants, or that the private and state defendants participated in the sort of joint activity necessary to supply the requisite state action. For these reasons, defendants Harrison; Cohen and the P.C.; and Shadeed's motions for summary judgment on Count I of plaintiff's complaint are GRANTED. Because the court finds that plaintiff's theories of section 1983 liability against the private defendants are not without colorable merit, defendant Shadeed's motion for imposition of sanctions pursuant to Fed.R.Civ.P. 11 is DENIED.

3. Eleventh Amendment Immunity.

The state defendants contend that DFACS is an agency of the state of Georgia and that they are therefore

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[15] To the extent *Motes* does stand for the proposition that a private person's misuse of a state procedural law can supply the requisite state action, it is contrary to both Eleventh Circuit and Supreme Court authority. *See Lugar*, 457 U.S. at 940-41, 102 S.Ct. at 2755-56 (one invoking state statute without grounds to do so is not a state actor); *Scott*, 720 F.2d at 1546 (use of state procedure does not constitute state action). In such instances, the court must either reject the inconsistent precedent in favor of the Supreme Court authority, *United States v. Hobson*, 672 F.2d 825, 827 (11th Cir.1982), or follow the earlier of two conflicting cases. *Robinson v. Tanner*, 798 F.2d 1378, 1383 (11th Cir.1986). Under either rule, the *Motes* decision would not be followed.

entitled to eleventh amendment immunity. The eleventh amendment to the United States Constitution bars suits by private parties in federal court "seeking to impose a liability which must be paid from public funds in the state treasury."[16] *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974); *Parker v. Williams*, 855 F.2d 763, 766 n. 2 (11th Cir.1988); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.1985). This immunity therefore applies to states and state officials in their official capacity as well as to other entities properly described as "arms" of the state. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977); *Fouche v. Jekyll Island State Park Authority*, 713 F.2d 1518, 1520 (11th Cir. 1983). In determining whether a particular entity is an "arm of the state" for the purposes of eleventh amendment immunity, federal courts must make reference to the state law creating and defining the entity. *Mt. Healthy*, 429 U.S. at 280, 97 S.Ct. at 572; *Brown v. East Central Health District*, 752 F.2d 615, 617 (11th Cir.1985). "The state law provides assistance in ascertaining whether the state intended to create an entity comparable to a county or municipality or one designed to take advantage of the state's eleventh amendment immunity." *Tuveson v. Florida Governor's Council on*

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[16] The eleventh amendment states only that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." This immunity extends beyond the exact words of the amendment, however, and includes suits such as the instant case in which a state is sued by its own citizen. *Hans v. Louisiana*, 134 U.S. 1, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Indian Affairs, 734 F.2d 730, 732 (11th Cir.1984) (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401 (1979)). The Supreme Court has identified several factors relevant to this analysis. They are: (1) How does state law define the entity? (2) What degree of control does the state maintain over the entity? (3) Where is the funding for the entity derived? (4) What funds would be used to satisfy any judgment against the entity? (5) How have the state courts treated the entity? *See Tuveson*, 734 F.2d at 732; *Fouche*, 713 F.2d at 1520; *Harden*, 760 F.2d at 1163. The court will address each of these factors in turn.

a. How does Georgia law define DFACS?

Defendants note initially that each county DFACS (hereinafter "the county departments") was created by and exist by virtue of state law. This observation is correct. O.C.G.A. § 49-3-1(a) provides,

> There shall be in each county of the state a county department of family and children services, which shall consist of a county board of family and children services, a county director of family and children services, and such additional employees as may be necessary for the efficient performance of the welfare services of the county.

Section 49-3-1(a) is also helpful in defining the county departments' functions; i.e., to administer welfare services in their respective counties. Further guidance on this point is found in O.C.G.A. § 49-3-6. This statute provides in relevant part that each county department

> Shall be charged with the administration of all forms of public assistance in the county, including home relief; indoor and outdoor care for those in need; aid to families with dependent children; old age assistance; aid to the blind and otherwise handicapped; the care and treatment of dependent, neglected, delinquent and handicapped children; and such other welfare activities as shall be delegated to it by the Department of Human Resources or by the County Commissioners. The county department shall also investigate and pass upon all applications for admission to and discharge from county institutions which provide care and treatment for indigents. If so appointed by a court of competent jurisdiction, the Department of Human Resources or the county or district department of family and children services shall perform under the supervision of such court the function of probation officer or agent of the court in any welfare or penal matters which may be before it.

The court finds these provisions significant in view of the duties and powers vested in the State Department of Human Resources[17] by Georgia law. These include (1) the administration and supervision of public assistance and other welfare activities and services in the state; (2) the organization and supervision of the county departments for the effective administration of welfare functions; and (3) the designation of the county departments to serve as agents in the performance of all state welfare activities in the counties. O.C.G.A. § 49-2-6.

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[17] Which is without question an "arm of the state." O.C.G.A. § 49-2-5 (the Department of Human Resources is declared to be an institution of the state).

Finally, the court finds O.C.G.A. §§ 49-4-2 and 49-4-3 helpful in defining the county departments. The former statute defines the term "department" as used in the Georgia Public Assistance Act of 1965 (the Act) to include the State Department of Human Resources as well as the county departments. O.C.G.A. § 49-4-2(1). Similarly, § 49-4-3 provides that the Act "shall be administered by the Department of Human Resources, *including the county departments of family and children services* acting under the direction and supervision of the Commissioner [of Human Resources]." O.C.G.A. § 49-4-3(b). These statutes strongly suggest that the county departments are instrumentalities of the State Department of Human Resources rather than separate county entities.

b. What degree of control does the State of Georgia maintain over DFACS?

As noted by defendants, the degree of control over the county departments maintained by the State of Georgia through the State Department of Human Resources is extensive. First, the members of each county board are appointed by the Commissioner of Human Resources. O.C.G.A. § 49-3-2(a).[18] In addition, the commissioner is

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[18] Each appointment is to be made following the recommendation and nomination of three candidates by the county board of commissioners. *Id.* This law has been interpreted as allowing the commissioner of Human Resources to reject the county board's candidates, however, and to appoint board members on his own motion. *See* 1963-65 Op.Att'y Gen. p. 256; *see also Horne v. Skelton*, 152 Ga.App. 654, 263 S.E.2d 528 (1979).

authorized to promulgate rules and regulations governing the selection of the chairman and vice chairman of each county board. O.C.G.A. § 49-3-2(d). Similarly, the commissioner is designated the appointing authority for the county director of each county department. O.C.G.A. § 49-3-3(a). Each director (1) is to be appointed from the State Merit System of Personnel Administration Register, *id*; (2) must post a fidelity bond "in such a manner and under such terms and conditions as may be prescribed by the Department of Human Resources," O.C.G.A. § 49-3-3(b); and (3) may be removed from office by the State Personnel Board and the State Merit System of Personnel Administration. O.C.G.A. § 49-3-7.

Second, the employees of each county department are appointed subject to the approval of the Commissioner of Human Resources and pursuant to the rules and regulations of the State Department of Human Resources and the State Merit System of Personnel Administration. O.C.G.A. § 49-3-4(a). Their salaries are likewise fixed pursuant to the salary schedule prescribed by the State Department of Human Resources. O.C.G.A. § 49-3-4(b). Finally, each employee of a county department may be transferred from one county department to another by the Commissioner of Human Resources. O.C.G.A. § 49-3-4(c). These provisions are clearly inconsistent with the notion that employees of the county departments are employed by their respective counties and suggest instead that each is a state employee under the State Department of Human Resources. *See Horne*, 152 Ga.App. 654, 263 S.E.2d 528.

Finally, the responsibilities of each county department as defined in O.C.G.A. § 49-3-6 are to be carried out

under the supervision of the State Department of Human Resources. More specifically, each county department is statutorily required to administer public assistance in the respective counties subject to the rules and regulations prescribed by the State Department of Human Resources and to report to the State Department of Human Resources "at such times and in such manner and form as the department may from time to time direct." O.C.G.A. §§ 49-4-34, 49-4-54, 49-4-83, and 49-4-104; *see also* O.C.G.A. § 49-1-2. Moreover, the county departments' responsibilities are actually delegated to the county departments by the State Department of Human Resources. *See* O.C.G.A. § 49-3-6; *see also* O.C.G.A. § 49-2-6. Thus, as previously noted, the State of Georgia maintains considerable control over the county departments.

c. Where is DFACS funding derived?

As noted by defendants, the county departments' funding consists of state and federal funds made available to and disbursed by the State Department of Human Resources, O.C.G.A. § 49-2-5, as well as county funds *voluntarily* provided by the county boards of commissioners. *See* O.C.G.A. §§ 49-2-9, 49-2-10 and 49-2-11.[19] No

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[19] It must also be noted that the county departments are required to submit their budgets to the governing boards of their respective counties. *Id.* Because financial participation in the county departments' activities is not mandatory, however, the court presumes this requirement is designed to aid the counties in determining the extent of their voluntary participation.

county is statutorily required "to participate in the cost of [providing] public assistance or in the cost of the administration thereof."[20] O.C.G.A. § 49-4-17. From this, the court concludes that most if not all of the funding for the county departments is derived from sources other than the counties themselves.

d. What funds would be used to satisfy any judgment against DFACS?

No information bearing directly on this issue is available to the court. Based on the foregoing discussion, however, and with particular emphasis placed on the issues of funding and control, the presumption arises that the state would be responsible for satisfying any judgment against a county department. *See Harden*, 760 F.2d at 1164; *Fouche*, 713 F.2d at 1521. Though this presumption is by no means irrebuttable, the court cannot say "with 'a virtual certainty' that the damages would be paid from county and not state funds." *Parker*, 855 F.2d at 766 n. 2 (quoting *Edelman*, 415 U.S. at 668, 94 S.Ct. at 1358). Moreover, as has already been noted, Georgia law establishes a county department in each county of the state. With the approval of the State Department of Human Resources, however, two or more counties may unite and form a *district* department of family and children services, with a single district board comprised of individuals from each county within the district. O.C.G.A. § 49-3-1(b). This would create the possibility of multi-county liability

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[20] The counties are apparently required to reimburse members of the county board for traveling expenses and the like, however. O.C.G.A. § 49-3-2(e).

should the county departments ultimately be found not to be state entities. While this observation does not itself lead to the conclusion that the State of Georgia would be responsible for any judgment against a county department, it is nevertheless inconsistent with the notion that the county departments are county entities.

e. How have the Georgia courts treated DFACS?

The most important consideration in analyzing the county departments' function and characteristics for the purposes of eleventh amendment immunity is their treatment by the Georgia courts. *Tuveson*, 734 F.2d at 732. The court must first note, however, that it is aware of no Georgia decisions addressing the issue with regard to eleventh amendment or sovereign immunity. Nevertheless, Georgia decisions addressing the broader issue of whether the county departments are state or county entities for other purposes are instructive and are therefore properly considered. *Id.* at 733. In this regard, one Georgia appeals court has described a county department as "an instrumentality of the Department of Human Resources." *Horne v. Skelton*, 152 Ga.App. 654, 657, 263 S.E.2d 528 (1979) (construing extent of Commissioner of Human Resources' authority to appoint county department director). In so doing, the *Horne* court relied upon *dicta* found in an opinion rendered three years earlier in *Georgia Department of Human Resources v. Demory*, 138 Ga.App. 888, 888-89, 227 S.E.2d 788 (1976) ("unlike county departments of family and children services, county boards of health are not instrumentalities of the Department of Human Resources"). Neither statement

controlled the outcome of those cases, however. In *Employees Retirement System of Georgia v. Baughman*, 241 Ga. 339, 245 S.E.2d 282 (1978), the opposite was true. In *Baughman*, the issue before the Georgia Supreme Court was whether county department employees are county or state employees for the purposes of the state retirement system. Placing emphasis on the extent of control maintained by the State Department of Human Resources over county department employees, the court determined that the appellees were full-time state employees entitled to creditable service under the state retirement system. *Baughman*, 241 Ga. at 340-41, 245 S.E.2d 282.

The court is also guided by numerous appellate and supreme court opinions concerning the function of the county departments in the juvenile court system. First, juvenile court petitions filed by the county departments are construed as having been filed by the Department of Human Resources "by and through" the particular county department. *See, e.g., In the Interest of R.A.S.*, 249 Ga. 236, 290 S.E.2d 34 (1982); *Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Brown v. Phillips*, 178 Ga.App. 316, 342 S.E.2d 786 (1986); *In the Interest of D.S.*, 176 Ga.App. 482, 336 S.E.2d 358 (1985). Second, based apparently on the above observation, the State Department of Human Resources has standing to appeal juvenile court decisions rendered against the county departments. *See, e.g., In the Interest of W.J.K.*, 188 Ga.App. 299, 372 S.E.2d 681 (1988). Finally, and of particular significance to the case at bar, when a juvenile court orders a child removed from his home and placed with a county department, legal custody of the child is vested in the State Department of Human

Resources. *See, e.g., In Re R.L.M.*, 171 Ga.App. 940, 321 S.E.2d 435 (1984); *In Re M.M.A.*, 166 Ga.App. 620, 305 S.E.2d 139 (1983); *Maynard v. Berrien County Department of Family and Children Services*, 162 Ga.App. 618, 292 S.E.2d 455 (1982); *Farmer v. Union County Department of Family and Children Services*, 162 Ga.App. 66, 290 S.E.2d 163 (1982). The court finds these observations strongly indicative of a relationship between the State Department of Human Resources and the county departments independent of a separate county existence. For this reason, and in light of the other factors discussed above, the court concludes that the county departments, including the defendant Cobb County Department of Family and Children Services, were created by state law to administer the public assistance programs of the Georgia Department of Human Resources and their respective counties; that they were established in each county of the state merely to facilitate the more efficient administration of these programs; and that they are therefore state rather than county entities for the purposes of eleventh amendment immunity. Accordingly, summary judgment is GRANTED as to defendant DFACS and defendants Dempsey, Terry and Pendergraft in their official capacities as employees of DFACS. DFACS is hereby DISMISSED from this action.

4. Qualified Immunity.

The law recognizes that inevitably, state officials, in the performance of their discretionary duties, will reasonably but mistakenly conclude that circumstances justifying certain conduct are present, and that those officials – like other officials who act in ways they reasonably

believe to be lawful – should not be held personally liable. *Clark v. Evans*, 840 F.2d 876, 881 (11th Cir.1988) (quoting *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987)). For this reason, defendants Dempsey, Terry and Pendergraft are entitled to qualified immunity if the law with respect to their actions was unclear at the time the cause of action arose. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1983); *Clark*, 840 F.2d at 879. On the other hand, no immunity attaches if defendants reasonably should have known that their actions violated clearly established constitutional rights. *Harlow* 457 U.S. at 818-19, 102 S.Ct. at 2738-39; *Jones v. Preuit and Mauldin*, 851 F.2d 1321, 1323-24 (11th Cir.1988) (en banc). Thus, on a motion for summary judgment based upon a qualified immunity defense, the court must determine (1) the currently applicable law; (2) whether that law was clearly established at the time of the alleged deprivation; (3) whether a reasonable official could have believed his actions were lawful in light of that law and the information possessed by the defendants at that time; and (4) whether the defendants actually engaged in conduct that violated that law. *Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir.1988); *Herren v. Bowyer*, 850 F.2d 1543, 1545-46 (11th Cir.1988). The court will address these questions in turn.

The court has determined and the parties agree that the interest of a parent in the companionship, care, custody and management of his or her children is a liberty interest within the meaning of the fourteenth amendment. *See Lehr*, 463 U.S. at 256-58, 103 S.Ct. at 2990-92.

Accordingly, it is axiomatic that plaintiff's liberty interest in his custody of Carl was a right of which he could not legally be deprived without due process of law. *Id.* It is likewise undisputed that a parent's interest in the custody of his or her child has been clearly established as a liberty interest under the fourteenth amendment for well over half a century. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 573-74, 69 L.Ed. 1070 (1925). Thus, the proper inquiry at this stage of the qualified immunity analysis is "the objective (albeit fact specific) question whether a reasonable [official] could have believed . . . [defendants' actions] to be lawful, in light of clearly established law and the information . . . [defendants] possessed." *Anderson*, 107 S.Ct. at 3040.

A proper discussion of this factor requires a more complete statement of the law applicable to this action. While it is true that a parent enjoys a protected liberty interest in the custody of his or her child, it is (and was) equally well established that state officials may temporarily deprive a parent of custody under narrow circumstances without prior notice or opportunity for hearing. *See Parratt*, 451 U.S. at 538-41, 101 S.Ct. at 1914-16; *see also Robison v. Via*, 821 F.2d 913, 921-22 (2d Cir.1987); *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2d Cir.1977); *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir.1983); *Sims v. State Department of Public Welfare*, 438 F.Supp. 1179, 1192 (S.D.Tex. 1977), *rev'd on other grounds*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C.1973), *aff'd*, 414 U.S. 1139, 94 S.Ct. 889, 39 L.Ed.2d 96 (1974). Thus, the question becomes

whether there was an objectively reasonable basis for defendants to believe Carl's life, safety or welfare were threatened and further that this threat was of sufficient proportions and immediacy to warrant *ex parte* treatment.

The record shows that prior to obtaining the *ex parte* deprivation order, defendants' only source of information regarding Carl's predicament was defendant Harrison. Defendant Dempsey, the only defendant to have personally spoken with defendant Harrison at that time, testifies that she was informed by defendant Harrison that Carl

> Had a real bad infection in his leg and that he needed antibiotics given to him three times a day, and that they had been given to him intravenously but that his surface veins had collapsed and they couldn't do that any longer and they needed to insert a Hickman catheter.

Dempsey Deposition at 46-7. Defendant Dempsey testifies further that defendant Harrison informed her Carl "would either die from the infection or lose his leg [if he did not receive the prescribed antibiotics]," and that "[plaintiff] won't carry through with [insertion of the Hickman catheter]." *Id.* at 48. On the basis of this information, the decision was made to pursue an *ex parte* deprivation order. *Id.* at 48-9. Defendant Harrison testifies, however,

> Q: Did you tell Ms. Dempsey in this telephone conversation if Carl did not get this Hickman Catheter put in, he would die or lose his leg before Monday?
>
> A: No.
>
> Q: Did you ever indicate that to her in any way?

A: I did tell her that Dr. Cohen felt that this was an important procedure for him and that if he did not receive the antibiotics on a regular basis, that he had a very poor chance of not losing his leg and may die.

Q: Well, did you tell her what might happen before the weekend was over it this was not done?

A: No.

Q: You didn't say to her that he could lose his leg if it's not done immediately?

A: She didn't ask, that I know of.

Q: You didn't tell her that?

A: No.

Q: You didn't imply that in any way?

A: Not that I'm aware of. I told her what Richard Cohen told me.

Q: Did you tell her . . . that you had been trying to get the father to approve this treatment?

A: I told her that it had been discussed with the father, yes.

. . . .

Q: Did you say to Ms. Dempsey or lead her to believe that this had to be done immediately, that the Hickman catheter insertion had to be done immediately?

A: No.

Q: Did she ask you what would happen if the Hickman catheter was not inserted that day?

A: No.

. . . .

Q: Well, did you indicate to Ms. Dempsey that you had discussed the implantation of the Hickman catheter with Dr. Cohen and that you and he had jointly reached this decision?

A: No.

Harrison Deposition at 173-76. Construing the foregoing in a light most favorable to plaintiff, *Samples v. City of Atlanta*, 846 F.2d 1328, 1331 (11th Cir.1988), it appears that a substantial question of fact exists as to just what information was actually available to defendants when the decision was made to seek custody of Carl on an *ex parte* basis. Because the court cannot determine whether an objectively reasonable basis for defendants' actions existed, this aspect of defendants Dempsey, Terry and Pendergraft's motion for summary judgment must be DENIED.

Defendants argue alternatively that even if a question exists as to whether plaintiff's parental rights were violated, then under the undisputed facts of this case, such a violation could amount to no more than simple negligence. *See Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (simple negligence cannot violate due process clause). The same factual issue which precludes summary judgment on defendants' qualified immunity claim defeats this argument as well, however. Construing plaintiff's evidence liberally, *Samples*, 846 F.2d at 1331, a jury question clearly exists as to whether defendants' actions were taken in willful disregard for plaintiff's parental rights. Accordingly, this aspect of

defendants Dempsey, Terry and Pendergraft's motion for summary judgment must be DENIED as well.

5. Supervisor Liability.

Plaintiff asserts a theory of supervisor liability against defendant Pendergraft. As noted by defendants, supervisors cannot be held liable for the acts of their subordinates solely on the basis of *respondeat superior*. *Fundiller*, 777 F.2d at 1443; *Geter v. Willie*, 846 F.2d 1352, 1354 (11th Cir.1988); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir.1981), *cert. den.* 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982). "[T]he mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Monell v. New York Department of Social Services*, 436 U.S. 658, 694 n. 58, 98 S.Ct. 2018, 2037 n. 58, 56 L.Ed.2d 611 (1977) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71, 96 S.Ct. 598, 603-04, 46 L.Ed.2d 561 (1976)); *see also Gilmere*, 774 F.2d at 1504; *Geter*, 846 F.2d at 1355. Furthermore, it is not enough to demonstrate that the supervisory official simply "went along" with the discretionary decisions made by his subordinates. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 927, 99 L.Ed.2d 107 (1988). Rather, § 1983 liability can only attach to a supervisory official if the requisite causation is established; i.e., that an affirmative link exists between the official's acts and/or omissions and the constitutional deprivation. *Rizzo*, 423 U.S. at 370-71, 96 S.Ct. at 603-04; *Fundiller*, 777 F.2d at 1443; *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086-87 (11th Cir.1986).

Thus, supervisor liability may attach where the supervisor (1) personally participated in the deprivation, *Goodson v. City of Atlanta*, 763 F.2d 1381, 1389 (11th Cir.1985); (2) expressly directed, authorized or approved the unconstitutional conduct, *Praprotnik*, 108 S.Ct. at 927; (3) established or implemented a policy or custom resulting in the constitutional injury, *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir.1986); (4) violated a duty imposed on his office by state law, *Hewett*, 786 F.2d at 1086-87; or (5) had notice of the need for improved training or supervision and nevertheless failed to take corrective action. *Fundiller*, 777 F.2d at 1086-87; *Goodson*, 763 F.2d at 1389.

Plaintiff's theory of liability against defendant Pendergraft is based upon his contention that she is the state official responsible for promulgating the policy which caused his constitutional injury; i.e., the practice of removing children from their parents without due process of law. In support of this contention, plaintiff provides the deposition testimony of defendants Dempsey and Pendergraft. Defendant Dempsey testifies as follows:

> Q: Why did you not try to call [Plaintiff] before you sought the *ex parte* order?
>
> A: Well I can honestly say in all my *ex parte* orders I've never contacted the parent prior to going to [juvenile] court. That was the reason why I didn't do it, just because it wasn't common practice to do that.
>
> Q: [It was] common practice not to?
>
> A: Right.
>
> Q: All right. So it was in keeping with your standard practice not to contact the parent?
>
> A: Right.

Q: Had that practice been approved by your supervisors?

A: Yes.

Q: Had it been approved by Ms. Pendergraft?

A: Yes.

. . . .

Q: Did any of your supervisors ever advise you against contacting the parents?

A: Yeah, in many instances.

Q: Who?

. . . .

A: Nancy Pendergraft, my direct supervisor.

Dempsey Deposition at 98, 150. This testimony is consistent with that of defendant Pendergraft:

Q: Now, I understand from your testimony [that] there were also instances where you sought an *ex parte* order but there was no indication that the parent would physically prevent the desired treatment. Is that correct?

A: That's correct.

Q: In those instances would there be any reason for not contacting the parent even after having made the decision, just to advise the parent what your office was doing?

A: We did not contact the parent until after it was done, period. I mean, we just didn't.

Q: Why?

A: That was just the way we proceeded.

Pendergraft Deposition at 120.

Based on the foregoing, the court concludes that defendant Pendergraft approved, authorized and implemented a policy or practice of depriving parents of their parental rights in the custody of their children without notice. Inasmuch as this is a recognized ground for supervisor liability, *Zatler*, 802 F.2d at 401, defendant Pendergraft's motion for summary judgment on this aspect of plaintiff's complaint must be DENIED.[21]

B. *Battery.*

Count Two of plaintiff's complaint states a pendent state law tort claim for battery.[22] Under Georgia law, the intentional and unnecessary offensive or harmful touching of the person of another, no matter how slight, is held to violate a personal right and therefore give rise to an action for battery. *See Greenfield v. Colonial Stores, Inc.*, 110 Ga.App. 572, 575, 139 S.E.2d 403 (1964); *A Child's World,*

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[21] At oral argument, plaintiff represented to the court that the section 1983 claim is brought in his individual capacity for violation of his parental rights as well as in his capacity as administrator of Carl's estate for some unspecified constitutional deprivation suffered by Carl. This issue has not been briefed nor has it been raised by any defendant in any summary judgment motion. Accordingly, any remaining defendants against whom this claim may lie are hereby invited to file summary judgment motions on the issue within thirty (30) days of the date of this order. The normal briefing schedule would apply and, because the facts of this case have been adequately briefed, the court's page limitation would not be waived.

[22] Defendant Pendergraft is omitted from plaintiff's battery claim.

Inc. v. Lane, 171 Ga.App. 438, 438, 319 S.E.2d 898 (1984); *see also* O.C.G.A. §§ 51-1-13, 51-1-14. The tort takes on added significance, however, where, as here, it is alleged to arise from the physician-patient relationship. In such instances, it is no defense to liability that the patient suffered no harm as a result of the examination, treatment or surgery in question or even that he benefited therefrom. Similarly, the physician cannot escape liability by demonstrating that his acts fell within the recognized standard of care. *Perry v. Hodgson*, 168 Ga. 678, 684-85, 148, S.E. 659 (1929); *Keen v. Coleman*, 67 Ga.App. 331, 20 S.E.2d 175 (1942). Thus, a party bringing such an action is relieved of the evidentiary burden normally associated with actions for medical malpractice.[23] *Mims v. Boland*, 110 Ga.App. 477, 481, 138 S.E.2d 902 (1964).

It is plaintiff's position that defendant Shadeed's insertion of the Hickman catheter in Carl constituted a battery, and that the instant defendants are liable in tort for having "aided, assisted and abetted" defendant Shadeed in the perpetration of this battery. Defendants assert their entitlement to judgment on this aspect of plaintiff's complaint on the grounds of consent.

As noted by defendants, Georgia law recognizes consent to the physical contact in question as an absolute defense to battery. *Hutcheson v. McGoogan*, 162 Ga.App. 657, 659, 292 S.E.2d 527 (1982); *see also* O.C.G.A. §§ 51-11-1, 51-11-2. In the context of the physician-patient relationship, this principle has been described as follows:

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[23] Though proof of causation and damages may involve a similar burden.

> Under proper factual conditions and circumstances, actions against medical practitioners based on assault and battery for acts arising out of their protectional conduct are recognized in Georgia. The relation of physician and patient is a consensual one, and the physician who undertakes to treat another without express or implied consent of the patient is guilty of at least a technical battery. An unauthorized and unprivileged contact by a doctor with his patient in examination, treatment or surgery would amount to a battery. In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable.

Irwin v. Arrendale, 117 Ga.App. 1, 5, 159 S.E.2d 719 (1967) (citing *Mims*, 110 Ga.App. at 481-82, 138 S.E.2d 902; *see also Bailey v. Belinfante*, 135 Ga.App. 574, 218 S.E.2d 289 (1975)). Thus, if the undisputed evidence of record establishes that the Hickman catheter procedure was carried out pursuant to valid and effective consent, plaintiff has no action for battery.

In support of their consent argument, defendants point out that legal custody of Carl at the time of the insertion of the Hickman catheter was vested in DFACS by the Juvenile Court of Cobb County and that defendant Dempsey, as DFACS' agent, was therefore authorized to consent on Carl's behalf to the procedure. Plaintiff argues, however, that (1) the order purporting to vest custody of Carl in DFACS was of no legal effect, and, in any event, (2) DFACS' custody of Carl did not carry with it authorization to consent to the procedure. The court will address these arguments in turn.

1. The Juvenile Court Order.

Plaintiff's challenge to the validity of the November 27, 1985 *ex parte* deprivation order is based on his contention that it was not entered by a properly appointed judicial officer. The court has determined, however, that defendant Walker's appointment as judge pro tempore of the Juvenile Court of Cobb County was made in compliance with Georgia law. *Pendiburg v. Dempsey*, 692 F.Supp. 1354, 1357-60 (N.D.Ga.1988). It follows, therefore, that the decision to grant DFACS' *ex parte* deprivation petition was a proper exercise of her jurisdiction. Accordingly, the court rejects plaintiff's challenge to the validity of the November 27, 1985 order.

2. Authority to Consent.

Plaintiff's alternative argument is not subject to such simple disposition. First, it is clear that the November 27, 1985 order does not itself specifically authorize DFACS to consent to surgical procedures on Carl's behalf. The order provides only that "the immediate temporary care, custody and control of [Carl] be . . . placed in the Cobb County Department of Family and Children Services until further hearing. . . ." Second, O.C.G.A. § 15-11-43,[24]

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[24] Defendants also contend that DFACS was authorized to consent to Carl's surgery pursuant to O.C.G.A. § 31-9-2(a)(4) which allows one standing in *loco parentis* for a minor child to consent to surgical treatment for that child. As plaintiff points out, however, DFACS, though Carl's legal custodian, did not have this status. *See In re M.A.F.*, 254 Ga. 748, 752, 334 S.E.2d 668 (1985); *see also* O.C.G.A. § 49-5-3(11).

which describes the rights and duties of DFACS as Carl's legal custodian, states only that DFACS had,

> the right to physical custody of [Carl], the right to determine the nature of the care and treatment of [Carl], including ordinary medical care, and the right and duty to provide for the care, protection, training, and education and the physical, mental, and moral welfare of [Carl], subject to the conditions and limitations of the order and the remaining rights and duties of the child's parents or guardian.

Thus, neither the November 27, 1985 order nor applicable statutory law specifically provided DFACS with authority to consent to Carl's surgery. On the other hand, there can be no doubt that under both the November 27, 1985 order and § 15-11-43, DFACS would be authorized, indeed required, to consent to any form of medical procedure if Carl's life hung in the balance.

The Georgia courts have apparently not been confronted with the question presently before the court; i.e., the extent of a legal custodian's authority to consent to extraordinary medical treatment. Georgia cases construing other aspects of the issue provide the court with needed guidance, however. First, it is clear that the mere placement of custody by a juvenile court does not deprive a parent of all parental rights in the child. *In the Interest of KB*, 188 Ga.App. 199, 200, 372 S.E.2d 476 (1988) (citing *Jackson v. Anglin*, 193 Ga. 737, 738, 19 S.E.2d 914 (1942)). Furthermore, it has been recognized that parents generally retain certain "residual rights" in the custody of their children which cannot be abrogated by the legal custodian under § 15-11-43. *Skipper v. Smith*, 239 Ga. 854, 856, 238 S.E.2d 917 (1977). This conclusion rests on the well

established principle that prior to the Juvenile Court's final termination of parental rights, certain rights still exist despite the loss of physical custody. *Id.* at 857, 238 S.E.2d 917. Indeed, this is clear from the language of § 15-11-43 itself. The right to consent to adoption is such a right, *id.*, as is the right to visit with one's child. *KB*, 188 Ga.App. at 200, 372 S.E.2d 476. The court believes the right to determine whether to pursue non-emergency extraordinarily intrusive medical treatment for one's child is also a right retained by the parent under § 15-11-43. *See In re LHR*, 253 Ga. 439, 321 S.E.2d 716 (1984); *see also Parham v. J.R.*, 442 U.S. 584, 602-04, 99 S.Ct. 2493, 2504-05, 61 L.Ed.2d 101 (1979).[25]

This having been decided, an obvious conflict is presented: On the one hand there is the legal custodian's "duty to provide for the care . . . and the physical- . . . welfare of the child," which clearly includes the duty to provide necessary extraordinary medical care; while on the other hand, there is the residual right to determine non-emergency extraordinary medical care retained by the parent. The extent of DFACS' authority to consent to insertion of the Hickman catheter in Carl therefore turns

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[25] Reference should also be made to the Cobb County Department of Family and Children Services' procedural manual. Plaintiff's Exhibit 7. This manual provides in relevant part, "[DFACS] has the right to sign for routine medical care once [it has] custody. Routine is described legally as regular examinations and normal physician's visits. *No surgical procedure or hospitalization is considered routine. For any surgical procedure, hospitalization or other nonroutine medical service, [DFACS] must either obtain the signature or permission of the c . stodial parent or a court order.*" *See* Pendergraft Deposition at 143-150.

on Carl's need for the procedure; i.e., whether an actual emergency existed.

A question of fact precludes summary judgment on this point. Defendant Shadeed, the physician who performed the procedure, has testified as follows:

> Q: Would you have classified the surgery that you did on Carl on the 28th of November as emergency surgery?
>
> A: I wouldn't classify it as emergency. I'd classify it as necessary.
>
> Q: What is your definition of necessary in this context?
>
> A: Necessary, the venous catheterization access in Carl was needed and indicated for continuous therapy of antibiotics concerning his injury and his infection, but I don't classify it as an emergency because it was not a life and death matter that he had to be operated on right then at that time.

Shadeed Deposition at 74-75; *see also* Weinberg Deposition at 43, 50; Bell Affidavit. Because a factual issue exists with regard to Carl's need for insertion of the Hickman catheter, the court is unable at this time to determine the scope of DFACS' authority to consent to the procedure.[26]

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[26] Compare *Davis v. Charter By-The-Sea, Inc.*, 183 Ga.App. 213, 358 S.E.2d 865 (1987). In *Davis*, the Georgia Court of Appeals reviewed the trial court's denial of the plaintiff/appellant's motion for directed verdict in a case likewise raising the issue of consent to medical treatment. In affirming the trial court, the court noted that, after the close of the plaintiff's case, a question remained as to "whether an emergency existed so that consent could be implied under [the Georgia Medical

(Continued on following page)

Accordingly, defendants are not entitled to summary judgment on this ground.

3. Joint Tortfeasor Liability.

Plaintiff argues that "civil liability for . . . battery is not limited to the direct perpetrator of the act charged; it extends to any person who by any means encourages or incites that act or aids and abets it." 6 Am.Jur.2d *Assault and Battery*, § 128. Defendants argue, on the other hand, that while Georgia recognizes joint tortfeasor liability, it requires a showing of malice on the part of those defendants who did not themselves commit the alleged tort.[27]

Defendants' argument is brought pursuant to Georgia's "joint wrongdoer" statute which provides in pertinent part, "In all cases, a person who maliciously procures an injury to be done to another . . . is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury." O.C.G.A. § 51-12-30.[28] The word "procure" as used in this statute "does not require the lending of

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Consent Law, O.C.G.A. section 31-9-1 *et seq.*]." 183 Ga.App. at 217, 358 S.E.2d 865. Though *Davis* raised the question of medical consent in a different context, the court believes that, like *Davis*, the jury's resolution of the emergency issue in the instant case is controlling.

[27] Obviously, this argument is not available to defendant Shadeed.

[28] Though § 51-12-30 is most often invoked in connection with claims for tortious breach of contract, it is by its own terms equally applicable to conventional tort claims, including assault and battery. *See Brigman*, 206 Ga. 222, 56 S.E.2d 471.

assistance in the actual perpetration of the wrong done by another." *Melton v. Helms*, 83 Ga.App. 71, 73, 62 S.E.2d 663 (1950). Rather, it is enough if the defendant succeeds in procuring another to commit an actionable wrong "through advice, counsel, persuasion or command," *id*, or that he "aided and abetted in the injuries received," without regard to the nature of the relationship between the parties. *Brigman v. Brenner*, 206 Ga. 222, 227, 56 S.E.2d 471 (1949); *Goddard v. Selman*, 56 Ga.App. 116, 192 S.E. 257 (1937). In the case at bar, it is clear that each defendant, either personally or through its agent,[29] wanted the Hickman catheter inserted in Carl and took certain actions to accomplish this goal through defendant Shadeed. In particular, the evidence identified and presented by plaintiff suggests that defendants Cohen and Harrison began to consider ways to subject Carl to the Hickman catheter procedure over plaintiff's objections several days prior to DFACS' intervention; that defendant Harrison contacted DFACS on two occasions and personally provided defendant Dempsey with the information which led to her decision to seek custody of Carl; and that Defendant Cohen directed defendant Harrison to place the second call to DFACS and personally arranged for defendant Shadeed to insert the Hickman catheter without

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[29] Under Georgia law, "Every person shall be liable for torts committed by . . . his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." O.C.G.A. section 51-2-2. In the case at bar, it is undisputed that all defendants were acting within the scope of their employment. *See Gaylor v. Jay & Gene's Chrysler-Plymouth Dodge, Inc.*, 183 Ga.App. 255, 358 S.E.2d 655 (1987).

"worry[ing] about the family consent." *See* Steiner Deposition at 27-28; Klaus Deposition at 14-15; Harrison Deposition at 120-135, 153-157, 176; G. Bendiburg Deposition at 23-25, 49-53; Shadeed Deposition at 51-52. Drawing all reasonable inferences in plaintiff's favor, *Samples v. City of Atlanta*, 846 F.2d 1328, 1331 (11th Cir.1988), the court finds that plaintiff has pointed to evidence that defendants "procured" the alleged battery within the meaning of section 51-12-30. *See Melton*, 83 Ga.App. at 73, 62 S.E.2d 663; *Brigman*, 206 Ga. at 227, 56 S.E.2d 471. The court therefore turns its attention to the second prerequisite to joint tortfeasor liability; i.e., malice.

The Georgia courts have determined that legal "malice" as used in connection with section 51-12-30 does not require a showing of personal ill will or animosity. *Luke v. DuPree*, 158 Ga. 590, 596, 124 S.E. 13 (1924); *Nager v. Lad 'N Dad Slacks*, 148 Ga.App. 401, 404, 251 S.E.2d 330 (1978), and is to be given a liberal meaning. *Wrigley v. Nottingham*, 111 Ga.App. 404, 405, 141 S.E.2d 859, *rev'd on other grounds* 221 Ga. 386, 144 S.E.2d 749 (1965); *Perry & Co. v. New South Insurance*, 182 Ga.App. 84, 90, 354, S.E.2d 852 (1987). Acts have been found to be malicious within the meaning of section 51-12-30 "when the thing done is with the knowledge of the plaintiff's rights and with the intent to interfere therewith." *Wrigley*, 111 Ga. App. at 405, 141 S.E.2d 859. In addition, malice has been described as "any unauthorized interference, or any interference without authorization or excuse." *Architectural Manufacturing Co. v. Airotec, Inc.*, 119 Ga.App. 245, 250, 166 S.E.2d 744 (1969); *Gilbert v. Jones*, 187 Ga.App. 303, 304, 370 S.E.2d 155 (1988).

Based on the evidence previously described, the court believes that a question of fact exists as to whether defendants acted "maliciously" under Georgia law in their efforts to have defendant Shadeed insert the Hickman catheter in Carl. It is clear that defendants arranged for the procedure with knowledge of and despite plaintiff's objections. *See Wrigley*, 111 Ga. App. at 405, 141 S.E.2d 859. It is therefore for a jury to decide whether defendants' interference with plaintiff's parental rights was caused by a legitimate and reasonable concern for Carl's welfare or motivated by "malice" as defined by the courts of Georgia. Accordingly, defendants' motions for summary judgment on plaintiff's battery claim are DENIED.[30]

4. Good Faith.

Defendant Shadeed asserts his entitlement to immunity from tort liability under O.C.G.A. section 31-9-6(c) with provides,

> Any person acting in good faith shall be justified in relying on the representations of any person purporting to give consent, including, but not limited to, his identify, his age, his marital status, his emancipation, and his relationship to any other person for whom the consent is purportedly given.

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[30] The state defendants have not raised any defense to plaintiff's "joint tortfeasor" theory of liability. Because the alleged battery could not have occurred without DFACS' "consent" to the Hickman catheter procedure, however, it is clear that Georgia's "joint wrongdoer" statute is no less applicable to them than to the private defendants.

Plaintiff argues that this statute is unavailable to defendant Shadeed under the facts of this case. The court believes otherwise. First, while the court has found no Georgia case addressing section 31-9-6(a), the statute is expressly made applicable to situations other than those described therein and clearly contemplates instances where, as here, one party purports to consent on behalf of another. Second, the statute, which is part of the Georgia Medical Consent Law, is to be "liberally construed." O.C.G.A. section 31-9-6(a). Finally, under the Georgia rules of statutory construction, the court is bound to give effect to the statutory language chosen by the General Assembly. O.C.G.A. section 1-3-1; *see also Jesup v. Bennett*, 226 Ga. 606, 176 S.E.2d 81 (1970). The court therefore concludes that the statutory language of section 31-9-6(a) is sufficiently broad to encompass the facts of this case and is thus available to defendant Shadeed.

Plaintiff argues in the alternative that a question of fact exists as to whether defendant Shadeed was acting in good faith when he accepted DFACS' authority to consent on Carl's behalf to the Hickman catheter procedure. The court agrees.

As alluded to previously, the Georgia courts have apparently not had occasion to define the "good faith" requirement of section 31-9-6(c). In general, "good faith" means "Honesty of intention and freedom from knowledge of circumstances which ought to put [a party] upon inquiry." Black's Law Dictionary 822 (4th ed. 1968). This definition is consistent with those offered by the Georgia courts in defining "good faith" in other contexts. *See, e.g., Home Finance Co. v. Bank of Lafayette*, 99 Ga.App. 873, 881, 110 S.E.2d 57 (1959) (failure to investigate may constitute

bad faith); *Ginn v. Citizens and Southern National Bank*, 145 Ga.App. 175, 177, 243 S.E.2d 528 (1978) (good faith is honesty in fact). The Georgia courts have also defined "good faith" as containing a "reasonableness" component. *See, e.g., Hartford Fire Insurance Co. v. Rowland*, 181 Ga. App. 213, 216, 351 S.E.2d 650 (1986); *Gillem v. MARTA*, 160 Ga.App. 393, 395, 287 S.E.2d 264 (1981).[31] The court believes that under any combination of these standards, a question of fact exists as to whether defendant Shadeed is entitled to the good faith immunity of the Georgia Medical Consent Law.[32]

As the court has previously noted, it is clear that defendant Shadeed was aware of plaintiff's decision to withhold his consent to the procedure and that the procedure was nevertheless conducted over his specific objections. Indeed, it appears that defendant Shadeed personally discussed the risks and benefits of the procedure with plaintiff and was made aware of that time of plaintiff's position on the subject. Shadeed Deposition at 39-42. In addition, defendant Shadeed has testified that Carl's condition did not constitute a medical emergency

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[31] Conversely, "bad faith" has been defined as "bad purpose, bad intent, bad state of knowledge or desire," *Smith v. Maples*, 114 Ga.App. 529, 151 S.E.2d 815 (1966). It has likewise been determined that "while mere negligence is not enough to show bad faith, negligence can reach such a degree that a jury could infer bad faith therefrom." *Home Finance Co.*, 99 Ga.App. at 881, 110 S.E.2d 57.

[32] Significantly, section 31-9-6(c) does not limit the good faith requirement to good faith reliance on the apparent authority of one party to consent on behalf of another. Rather, the statute requires good faith in all relevant respects.

and that alternatives to the Hickman catheter were available. *Id.* at 74-76. Moreover, when defendant Shadeed was asked to insert the Hickman catheter in Carl, he was told by defendant Cohen to "go ahead and make plans for it and not worry about the family consent," and without question or hesitation proceeded to schedule the operation. *Id.* at 52-53. Finally, defendant Shadeed has testified that, while he reviewed the consent form attached to Carl's medical chart, he conducted the procedure without discussing the consent or juvenile court order with anyone, that he did not know who had signed the consent form on Carl's behalf, and that he relied solely on defendant Cohen's representation that the consent was valid. *Id.* at 66-72. Based on this evidence, the court concludes that a question exists as to defendant Shadeed's good faith; i.e., whether defendant Shadeed's failure to inquire further into the circumstances of DFACS' intervention was reasonable. Accordingly, defendant Shadeed's motion for summary judgment on Count II of plaintiff's complaint is DENIED as well.

III. CONCLUSION.

In conclusion, defendants' motions for summary judgment are GRANTED IN PART and DENIED IN PART as follows. Defendants' motions for summary judgment on plaintiff's substantive due process claim (Count I) are GRANTED and plaintiff's substantive due process claim is DISMISSED. In addition, summary judgment is GRANTED for DFACS as well as for defendants Dempsey, Terry and Pendergraft in their official capacities. DFACS is DISMISSED from this action. As to plaintiff's procedural due process claim (Count I), defendants

Dempsey, Terry and Pendergraft's motion is DENIED and defendants Harrison, Medical Personnel Pool of Atlanta, Inc., Cohen, Klaus, Cohen & Weil, P.C., and Shadeed's motions are GRANTED. As to plaintiff's battery claim (Count II), defendants' motions are DENIED. Finally, defendant Shadeed's motion for imposition of sanctions is DENIED.

APPENDIX D

GEORGIA DEPARTMENT OF HUMAN RESOURCES

CONTACT SHEET

Page No.:

Case Name:
Harry Bendiburg

Case No.:

Date Staff Member Type Contact/ Activity	Individual(s) Contacted Purpose, Content and/or Results of Contact:
11/27/85, TC P.S.D. Medical Neglect	from R.S. [Reporting Source] to report medical neglect of 15 year old Carl Bendiburg. Carl was in a fatal car accident in Sept. 1985 in which his mother was killed and his left leg was severely fractured – is now being held together by Jackson pins. Carl was in intensive care at Smyrna Hospital for 7 weeks and was discharged 2 weeks ago to his father Harry Bendiburg. Carl has been home since 11/11/85 and has a bad infection in his leg. His father will not follow through with treatment – Carl needs a central line put in to receive his medication because his surface veins have collapsed. The father will say he will follow through but never does. R.S. states that if Carl does not get immediate medical attention, he could either lose his left leg or die from the infection.

APPENDIX E

DRS. KLAUS, COHEN
AND WEIL

The 1620 Professional Bldg.
1620 Mulkey Road

ORTHOPAEDIC ASSOCIATES,
P.C.

Austell, Georgia 30001
(404) 941-7227

RICHARD M. KLAUS, M.D. RICHARD W. COHEN, M.D.

Fellows of the American
College of Surgeons

Fellows of the American Academy
of Orthopaedic Surgeons

CRAIG E. WEIL, M.D.
Hand Surgery

Doctors Building/Windy Hill
2520 Windy Hill Road • Suite 303
Marietta, Georgia 30067
(404) 952-1551

November 27, 1985

Judge Wayne Phillips
Juvenile Court
Cobb County

RE: Carl Bendiburg
Date of Birth: 2/21/70

Dear Judge Phillips:

I appreciate you taking your time in the case of Carl Bendiburg. This is a 15 year old white male admitted to Smyrna Hospital on September 15, 1985 having been severely injured in an automobile accident. His critical injuries consisted of a severe fracture of the left acetabulum along with a compound fracture of his left femur. He initially had a left laporotomy for evaluation of his abdomen but no serious internal injuries were noted. His left femoral wound and fracture was debrided and

closed and the fracture was stabilized. He subsequently went on to develop an acute osteomyeolitis and has had at least three operative procedures on his distal femur with multiple drainages and efforts at antibiotic care.

During his hospitalization we had a great deal of difficulty maintaining an IV but his surviving father refused to allow the insertion of a central catheter in order to maintain good antibiotic care. He subsequently was discharged on November 8, 1985 for home care under the care of Dr. Howard Cohen for his antibiotic and infection control and under my care for his orthopaedic problems. From November 8th until the November 27th at home, almost on a daily basis, his IV was lost and had to be restarted. It was intended that the patient would obtain antibiotics on a three times a day basis in order to treat the severe osteomyeolitis in his left femur but instead as a result of the IV problems was able to obtain no more than two antibiotic doses per day. As a result, after consultation with Dr. Howard Cohen and Dr. Shadeed it was recommended the patient should be admitted to the hospital today, November 27th, for the insertion of a Hickman central catheter that can be maintained hopefully for one to two months in order to maintain three times a day antibiotic care.

It is anticipated that the patient will be discharged from the hospital tomorrow after the central line has been placed.

In general, we have had a good deal of difficulty in obtaining the proper cooperation and therefore, care of this patient as a result of his father's refusal to allow appropriate procedures and treatment.

It is anticipated in the future this patient is going to need at least one to two months continuous antibiotic therapy, that his draining wound of the left thigh will need continued debridement and packing and that once closed, he may well require surgical procedures in order to allow the distal femoral fracture to heal and may well require bone grafting in this area.

At the present time he is in an external fixation device with multiple pins holding the fracture of his distal femur together. This device would need to be removed and bone grafts applied at some distant time.

In addition, this patient is going to need at some time in the future an operative procedure to reconstruct his left acetabulum and hip that has been fractured since the original injury but because of the infection in the distal femur we have been unable to treat because of the fear of contamination of the hip area. It is hoped that with the above treatment that we will be able to save this patient's left leg. We still feel, however, that there is no more than a 35% chance of clearing the osteomyeolitis and thus saving his left lower extremity.

It is because of this constant and severe struggle and battle in order to deal with the critical problem of the osteomyeolitis of the left femur that we have had to take the extraordinary measures that have been taken in the

recent week. We appreciate any support the Court can give us in this case.

Sincerely,

/s/ Richard W. Cohen, M.D.
Richard W. Cohen, M.D.
Windy Hill Office

RWC:sp

APPENDIX F

The following are the relevant sections of Georgia's Juvenile Court Code, Chapter 11 of Title 15 of Official Code of Georgia Annotated.*

O.C.G.A. § 15-11-2 (10)

> "Juvenile court intake officer" means the juvenile court judge, associate juvenile court judge, court service worker, or person employed as a juvenile probation or intake officer designated by the juvenile court judge or, where there is none, the superior court judge, which person is on duty for the purpose of determining whether any child taken into custody should be released or detained and, if detained, the appropriate place of detention. Each superior or juvenile court judge shall provide for one of the above persons to be on duty or on call as an intake officer during each 24 hour period.

O.C.G.A. § 15-11-17(a)(1)

> A child may be taken into custody:
>
> Pursuant to an order of the court under this article, including an order to an employee of the Department of Human Resources designated in accordance with paragraph (2) of subsection (i) of Code Section 49-5-10, to apprehend a child

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* The versions of the statutes reproduced in this appendix are as the statutes currently appear in the 1991 code. There have, however, been no material changes to these provisions since 1985, and these sections are as they would have appeared at the time period relevant to the actions of Petitioners.

who has escaped from an institution or facility operated by the department or a child who has been placed under supervision and who has broken the conditions thereof.

O.C.G.A. § 15-11-19(a)(3)

A person taking a child into custody, with all reasonable speed and without first taking the child elsewhere, shall:

> Bring the child immediately before the juvenile court or promptly contact a juvenile court intake officer. The intake officer shall determine if the child should be released or detained. Prior to an informal detention hearing, the child shall be placed in detention, if necessary, only in such places as are authorized by Code Section 15-11-20.

O.C.G.A. § 15-11-23

A petition alleging delinquency, deprivation, or unruliness of a child shall not be filed unless the court or a person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child.

O.C.G.A. § 15-11-30(b)

Except as otherwise provided under this article, a party is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency, unruliness, or deprivation and if, as an indigent person, he is unable to employ counsel, he is entitled to have the court provide counsel for him. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and to be provided with counsel by the court if he is an indigent person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented indigent person upon his request. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them.

APPENDIX G

FOR THE ELEVENTH CIRCUIT

Nos. 89-8173, 89-8259, 89-8348
89-8632, 89-8691, 89-8742

HARRY A. BENDIBURG,
Individually and as
Administrator of the Estate
of Carl Bendiburg,
Deceased,

Plaintiff-Appellee,

versus

PAMELA S. DEMPSEY, SUE
TERRY, AND NANCY J.
PENDERGRAFT,
Individually and as Officials
of the Cobb County Dept.
of Family and Children
Services, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 20, 1990, ___ F.2d___).

(Filed October 31, 1980)

Before: CLARK, Circuit Judge, RONEY*, Senior Circuit Judge, and ATKINS**, Senior District Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
UNITED STATES CIRCUIT JUDGE

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.